Supreme Court, U.S.
FILED

961243 FEB 5 1997

No. OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1996 -97

ROBERT CARLEN, M.D.

Petitioner,

- v -

DEPARTMENT OF HEALTH SERVICES;
DAVID HARRIS, M.D., Individually and as former Commissioner of the Suffolk County Department of Health Services;
SUFFOLK COUNTY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

In granting summary judgment for the defendants, U.S. District Court ruled that plaintiff's federal claims were inextricably intertwined with state law issues.

There were two wholly opposed final state law determinations of the same issues, one by the county defendants under civil service law, the other by a state agency under the physician disciplinary statutes.

The QUESTION is whether plaintiff, a jail physician alleging violations of his fundamental constitutional rights, is entitled to a federal trial because state law offers no procedure for reconciling the two determinations.

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Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner respectfully prays that a writ of certiorari issue to review the summary order of the United States Court of Appeals for the Second Circuit, entered on September 26, 1996.

CITATIONS OF REPORTS (OPINIONS BELOW)

The unpublished order of the U.S. Court of Appeals for the Second Circuit affirming the decision of the U.S. District Court, 1996 WL 547199 appears as Appendix A. Its order denying rehearing appears as Appendix B.

The decision of the U.S. District Court for the Eastern District of New York (912 F. Supp. 35) appears as Appendix C.

The order of the New York Court of Appeals denying leave

to appeal the affirmation of the civil service firing, 83 N.Y.2d 757, 615 NYS2d 874, appears as Appendix D.

The decision of the Supreme Court of the State of New York, Appellate Division, Second Judicial Department, affirming the civil service firing, 200 A.D.2d 619, 608 N.Y.S.2d 851 (1994), appears as Appendix E.

The order of the New York Court of Appeals denying leave to appeal the injunction decision of the Appellate Division, 73 NY2d 709, 540 NYS2d 1004, appears as Appendix F.

The decision of the Appellate Division, Second Department, affirming New York Supreme Court's dismissal of the injunction petition, 140 A.D.2d 288, 527 N.Y.S.2d 538 (1988) appears as Appendix G.

The decision of New York Supreme Court denying the injunction petition is not reported. It appears as Appendix H.

The civil service determination by Commissioner Harris appears as Appendix I.

The findings of fact and conclusions of law of the civil service hearing officer appears as Appendix J.

The final determination of the Office of Professional Medical Conduct of the New York State Department of Health is given as Appendix K.

JURISDICTION

Judgment for the defendants was entered on September 26, 1996 by a three-judge panel of the United States Court of Appeals for the Second Circuit. Petition to that court for a rehearing in banc was denied on November 8, 1996. Supreme Court has jurisdiction to review these orders on a writ of certiorari under 28 U.S. Code 1254(1).

CONSTITUTIONAL PROVISIONS

Amendment I. Congress shall make no law...abridging the freedom of speech.

Amendment VIII. Cruel and unusual punishments [shall not be] inflicted.

Amendment XIV. [No] State [shall] deprive any person of...liberty or property, without due process of law.

STATEMENT OF THE CASE

From 1976 to 1987 plaintiff, a tenured civil servant, was a half-time jail physician employed within the Division of Patient Care Services of the Suffolk County (N.Y.) Department of Health Services, of which defendant Dr. David Harris was commissioner. He had always received at least satisfactory evaluations.

A woman with a life-threatening blood clot was jailed in the summer of 1985. (She was later referred to as patient 34.) Dr. Carlen concluded that anticoagulation treatment failed because the physicians covering him on his days off prescribed doses that were too small. A plea for help to Dr. William Steibel, the head of Patient Care Services and Dr. Harris's right-hand man, went unheeded. Dr. Carlen entered these details into the patient's official medical record.

These medical record entries prompted Dr. Steibel to call Dr. Carlen to a meeting in his office on January 27, 1986. Dr. Carlen was given a letter dated January 15, 1986 from three county-funded physicians, evaluating his work. They found his medical care excellent but they strongly criticized his entries on this patient's official medical record, declaring that they jeopardized the county's legal position.

Dr. Steibel ordered Dr. Carlen to cease writing such notes. Dr. Carlen refused. Dr. Steibel then told him that two physicians

(Drs. Feldman and Greenberg) newly joining the department would help control him.

Later that day (January 27, 1986) Dr. Steibel put his demand in writing. In his letter he gave Dr. Carlen permission to record his observations in private files.

In his lengthy reply of February 24, 1986 Dr. Carlen again refused, stating, "There's only one record that counts and that is the chart we all write on. Putting differences of medical opinion in writing makes everyone able to compare them."

The defendants then began a campaign of harassment, making it more and more difficult for Dr. Carlen to fulfill his responsibility to recommend and to order tests and treatments in accordance with his best professional judgment. Under increasing pressure, Dr. Carlen, writing on his own letterhead in March and July of 1986, sought a ruling from Commissioner Gordon Ambach of the state licensing and disciplinary agency. Dr. Carlen asked whether New York State will accept a double standard of practice, a physician's best judgment for his private patients and his employer's standard for his clinic patients.

Commissioner Ambach replied by letter on July 22, 1986:

> [T]he same standards of professional practice apply to physicians who may be engaged in independent practice or who may be employed full-time by a health maintenance organization, a hospital, or related facility. All physicians licensed to practice medicine in New York State are expected to provide the same level of care to all patients, regardless of the setting of their practice. This is a fundamental principle which cannot be compromised or abrogated under any circumstances.

Dr. Carlen had previously informed Dr. Steibel of his inquiry. Dr. Steibel told him, "You don't work for the state," and, "You should be in private practice." Then Dr. Carlen sent the Ambach reply itself to Dr. Steibel (and later to Dr. Harris). Dr. Steibel's immediate response was to begin the county's progressive discipline system against Dr. Carlen, declaring, "You can write to anyone you please." Dr. Steibel ordered Dr. Carlen to follow the orders of Dr. Greenberg, the jail's medical director, knowing full well that Dr. Carlen would be jeopardizing his medical license by obeying.

Dr. Carlen in December 1986 petitioned the state courts under Article 78 of the Civil Practice Law and Rules to enjoin Drs. Harris, Steibel and Greenberg from interfering with his professional judgments and the performance of his professional duties. Dr. Carlen alleged numerous serious deficiencies in the jail's medical care, including a policy of requiring material omissions from prisoners' medical records.

Dr. Carlen lost on procedural grounds. The Appellate Division added in dicta, "The respondents clearly had the authority to direct the manner in which the petitioner performed his duties" (*Carlen v. Harris*, 140 AD2d 288, 527 NYS2d 538 (2 Dept 1988), *lv. den.* 73 NY2d 709, 540 NYS 2d 1004 (*Carlen I*)).

Meanwhile, in January 1988 under section 75 of the New York Civil Service Law, Dr. Harris brought charges of insubordination and incompetence (47 counts each) against Dr. Carlen, based upon the care he rendered to 23 inmates. No bad outcomes were alleged, much less any harms.

The gravamen of the insubordination charges was that Dr. Carlen refused to follow professional orders he disagreed with and refused to keep embarrassments and disagreements off prisoners' medical records. Dr. Harris appointed another Suffolk County employee as the hearing officer.

Dr. Steibel testified for his employer. On direct

examination he explained why the county adopted its recordkeeping policy:

> Q. Dr. Steibel, why is it improper to write unacceptable comments about other doctors in the chart?
> A. It's a question of ethics involved, but also a question of protecting the County in medical liability suits. These comments sometimes can be misinterpreted by the Courts, very critical of the very care [we've] given (transcript, May 10, 1988, 19:20-25).

The county's lead witness, Dr. Judith Feldman, its Director of Adult Services, echoed Dr. Steibel in repeatedly saying how dangerous it would be if Dr. Carlen's notes were to be made public. But Dr. Harris's own ethics expert, Peter Williams, Ph.D., J.D., testified that disagreements should go into the medical chart (Oct. 31, 1989, 8:17--9:2), as did Dr. Greenberg, the jail's medical director (Apr. 29, 1988, 57:6--58:2).

In September 1987 (about four months before the civil service charges were preferred and ten months after the start of *Carlen I)*, Dr. Greenberg caused the Office of Professional Medical Conduct of the New York State Department of Health to investigate Dr. Carlen. (The office is part of the licensing and disciplinary apparatus for physicians in New York State.) Dr. Carlen alleges that after reviewing in great detail the 23 medical records and the civil service charges based upon them, the state office informed him by letter of February 27, 1989 that it found no evidence of misconduct and so was closing its file. The state held no hearing because it found nothing to hold a hearing about.

Nine months later in November 1989, as Dr. Harris's hearing was drawing to a close, Dr. Carlen informed Dr. Steibel

that "The state threw the whole thing out."

On January 23, 1990 Dr. Harris's hearing officer found Dr. Carlen guilty of all charges. On February 13, 1990 Dr. Harris adopted all of the hearing officer's findings.

Dr. Carlen alleges that on the morning Dr. Steibel gave him the firing letter (February 13, 1990), Dr. Steibel told him that he and Dr. Harris were dismissing him because they wanted a physician who would see things their way. Dr. Steibel reassured Dr. Carlen that his professional competence was never in question. When Dr. Carlen pointed out that Dr. Harris had just convicted him of incompetence, Dr. Steibel denied even more strongly that there was any such issue. This statement is a repudiation of half the grounds used to fire Dr. Carlen.

In June 1990 Dr. Carlen brought a special proceeding under Article 78 to review Dr. Harris' determination.

In January 1993 under 42 U.S.C. 1983, Dr. Carlen filed the U.S. District Court action against Dr. Harris and other Suffolk County defendants. The substance of his federal complaint was that he had a First Amendment right to protest constitutionally inadequate medical care at the jail, that he had an Eighth Amendment right not to contribute to these deprivations, and that the defendants violated his right to due process under the Fourteenth Amendment by perpetrating a civil service hoax, all to get rid of him so that they could continue their constitutional wrongdoing.

On April 9, 1993, prior to the Appellate Division oral argument, Dr. Carlen asked the U.S. District Court to exercise supplemental jurisdiction in accordance with 28 U.S. Code 1367(a), to enable the one single adjudicating court to comprehensively decide all the factual and legal issues. Defendants successfully opposed supplemental jurisdiction.

On January 18, 1994 the Appellate Division found that each of the charges and specifications was supported by substantial evidence, and that it had already determined in the prior injunction

action brought by Dr. Carlen in December 1986 (*Carlen I*) that as a matter of law, Dr. Harris had the authority to direct the manner in which Dr. Carlen performed his duties. The New York Court of Appeals denied review. (*Carlen v. Harris*, 200 A.D.2d 619, 608 N.Y.S.2d 851 (2 Dept. 1994), *app. den.* 83 N.Y.2d 757, 615 NYS2d 874)(*Carlen II*).

Defendants moved for summary judgment which was granted by the U.S. District Court and affirmed by a three-judge panel of the United States Court of Appeals, which then denied a rehearing in banc.

This action arose under 42 U.S. Code 1983 and 1988. District Court had jurisdiction under 28 U.S. Code 1331 and 1343(a)(4).

ARGUMENT

POINT I

NEW YORK LAW IS FROZEN IN DEADLOCK BETWEEN THE TWO FINAL AND WHOLLY OPPOSED AGENCY DETERMINATIONS (COUNTY AND STATE), WITHOUT A PROCEDURE TO RECONCILE THEM. THE INTERTWINED CONSTITUTIONAL ISSUES THUS CONTINUE UNRESOLVED. THE FEDERAL COURTS MUST DETERMINE THE FEDERAL ISSUES.

The following is a factual comparison of the two proceedings:

Suffolk County Department of Health Services, David Harris, Commissioner:	**The New York State Health Department Office of Professional Medical Conduct:**
determination under N.Y. Civil Service Law	determination under N.Y. Education Law and Public Health Laws
disciplines and fires its employees for misconduct or incompetence	is the agency required by section 230 of the New York Public Health Law to investigate physicians alleged to be deficient; it holds hearings and makes findings dealing with suspension or revocation of licenses to practice medicine
proceeding initiated by Dr. Harris's department	investigation was initiated by Dr. Harris's department
Dr. Harris provided his 94 allegations, the 23 patient medical records and the witnesses for testimony taken	Dr. Harris provided the copy of his 94 allegations, the 23 patient medical records and the witnesses for whatever confidential interviews were conducted

Dr. Harris's allegations were divided, generally, into: refusal of Dr. Harris's orders; refusal to treat patients; not being a team player; bad medical recordkeeping; and incompetence in the practice of medicine	Dr. Harris's allegations were divided, generally, into: refusal of Dr. Harris's orders; refusal to treat patients; not being a team player; bad medical recordkeeping; and incompetence in the practice of medicine
Dr. Harris selected and designated the hearing officer, a county employee, Mr. Bahr	OPMC designated the investigator, Dr. Cohen
Mr. Bahr conducted a lengthy hearing about the 94 allegations on the 23 patients	Dr. Cohen conducted a full investigation, which included, as the need arose, questioning Dr. Carlen about his work on the 23 patients and all 94 allegations
Dr. Harris found Dr. Carlen guilty on all allegations of incompetence and insubordination, 47 each, a total of 94 allegations	OPMC found nothing in Dr. Carlen's work to warrant even a formal hearing; it dismissed the complaint and closed its case because of the total absence of evidence for any of the 94 allegations

no fair opportunity for Dr. Carlen to contest the charges since the ultimate decision after the hearing was made by Dr. Harris.	fair opportunity for Dr. Harris to provide interviews and evidence, and to argue his position in an external, truly disinterested and expert forum.
By statute, the county health department is required to have the same interest as the state health department in good patient care. Dr. Harris was required to provide such care.	By statute, the county health department is required to have the same interest as the state health department in good patient care. Dr. Harris was required to provide such care.
The day of the firing, Dr. Harris's bureau chief (Dr. Steibel) admitted that all the incompetence charges were a sham, thereby depriving Dr. Carlen of a fair forum.	There is no reason whatever to suspect any irregularity in the manner by which the OPMC arrived at its conclusions.
Affirmed by the Appellate Division of the New York Supreme Court.	Not appealed: no case or controversy between Dr. Carlen and OPMC.

Every court that has heard this controversy gave short shrift to the fact that New York State required Dr. Carlen, like every other medical licensee, to meet all applicable standards of professional conduct. Dr. Carlen's job with the county required

him to maintain a state medical license, so as a matter of law, if his license were revoked his job would go, too.

District Court criticized Dr. Carlen for not raising the matter of OPMC's conclusions in the Appellate Division's review of his firing. But the state's determination was not subject to review in that court or any other. So even if, in full knowledge, the Appellate Division had chosen Suffolk County's views over New York's, it had no power whatever to diminish the state's conclusions.

Dr. Carlen faced a Hobson's choice. If he disobeyed Dr. Harris, he would be fired under the civil service law (which is, of course, what actually happened). If he obeyed Dr. Harris by giving treatment he disapproved of, he would be guilty of the serious professional misconduct which state education commissioner Ambach explicitly warned him against, and would face license revocation. So by either route, Dr. Carlen loses his job.

New York law provides no procedure for reconciling the two final determinations. The intertwined constitutional issues are thus left in hopeless contradiction, as well. Only the federal courts can resolve this dilemma.

Finally, we say that just as Dr. Carlen is fully responsible for his professional acts, we recognize completely that Dr. Harris is fully responsible for the operation of the jail medical program. But there is no conflict between the obligations of these two physicians. Dr. Harris could have met his own obligation by hiring a physician who met the required state standards, and that's exactly what he did. The physician he hired was, of course, Dr. Carlen, certified by New York State on all the matters in contention.

POINT II

THE STATE COURT FINDINGS DO NOT PRECLUDE LITIGATION OF THE FEDERAL ISSUES IN FEDERAL COURT

The federal courts have ruled that they have no role in this controversy because all the issues between the parties were, or could have been, decided in the civil service proceeding and in the state court review which followed it.

A. Full and Fair Opportunity

Under New York preclusion principles, "[T]here must have been a full and fair opportunity to contest the decision now said to be controlling" (*Burgos v. Hopkins*, 14 F.3d 787, 792 (2d Cir. 1994), quoting *Schwartz v. Public Administrator*, 24 N.Y.2d 65, 298 N.Y.S.2d 955, 960 (1969)).

The Suffolk defendants won completely, but only in the forum over which they exerted sole control as accusers and judges. The New York courts will not disturb a determination if there's even minimal evidence in the record to support it and room for choice exists.

This judicial standard does not protect an employee against bias, manipulation and dishonesty, especially where expert knowledge is required. But the parties actually did have a full and fair opportunity to contest the issues in an external, disinterested and expert forum. In that forum -- the New York State Department of Health -- Dr. Harris failed to offer even a speck of evidence of Dr. Carlen's supposed misconduct. Dr. Harris's mountain of evidence shrank to not even a molehill, but simply disappeared.

B. Full Faith and Credit

Under the U.S. Constitution's Full Faith and Credit clause

(Art. IV, sec. 1), federal courts must accord state court judgments the same preclusive effect they would receive under state law (*see, Migra v. Warren City School District*, 465 U.S. 75, 81, 104 S.Ct. 892, 896, 79 L.Ed.2d 56 (1984); *see also* 28 U.S.C. 1738).

The New York Court of Appeals has consistently demanded that physicians use their best judgment (*Pike v. Honsinger*, 155 N.Y. 201, 49 N.E. 760 (1898); *Toth v. Community Hospital at Glen Cove*, 22 N.Y.2d 255, 292 N.Y.S.2d 440 (1968)), and has stated that "No medical doctor can be *required* to render services which, in the doctor's professional opinion, are dangerous or contraindicated" (*Rosenberg v. Equitable Life Assurance Society*, 79 N.Y.2d 663, 671, 584 N.Y.S.2d 765, 770 (1992), emphasis in original). It has further held that "The physician-patient relationship...operates and flourishes in an atmosphere of transcendent trust and confidence and is infused with fiduciary obligations (*Aufrichtig v. Lowell*, 85 N.Y.2d 540, 546, 626 N.Y.S.2d 743, 746 (1995)).

The usual test of whether a worker is an employee rather than an independent contractor is whether the employer can control his manner of work. In a series of decisions involving unemployment insurance contributions, the New York Court of Appeals has recognized that such a test cannot be applied to health workers, who must meet ethical and professional standards *(Matter of Concourse Ophthalmology Associates*, 60 N.Y.2d 734, 469 N.Y.S.2d 78, 456 N.E.2d 1201 (1983); *Matter of Goldstein*, 61 N.Y.2d 937, 474 N.Y.S.2d 969, 463 N.E.2d 370 (1984); *Matter of Salamanca Nursing Home, Inc.*, 68 N.Y.2d 901, 508 N.Y.S.2d 939, 501 N.E.2d 588 (1986)). Instead, the court looked to such factors indicating employee status as the use of employer's premises and equipment, scheduling of appointments by employer's receptionist, billings and collections by employer, and Medicare forms prepared by employer's staff.

These factors correspond perfectly to Suffolk County's

proper control over Dr. Carlen in matters like his work location and schedule, which in all his long years of employment have never given rise to even the smallest complaint.

Lower New York courts have thrice considered, and thrice rejected, physicians' "just following orders" defense *(Bowers v. The County of Essex*, 118 Misc. 2d 943, 461 N.Y.S.2d 959 (Sup. 1983); *Rho v. Ambach, as Commissioner of Education of the State of New York*, 144 A.D.2d 774, 534 N.Y.S.2d 758 (A.D. 3 Dept. 1988), *rev'd on other grounds*, 74 N.Y.2d 318, 546 N.Y.S.2d 1005 (Ct.App. 1989); *Somoza v. St. Vincent's Hospital*, 192 A.D.2d 429, 596 N.Y.S.2d 789 (A.D.1 Dept 1993). A physician cannot abandon individual responsibility by saying that he's part of a team (*Cohen v. State*, 51 A.D.2d 494, 382 N.Y.S.2d 128 (1976), *aff'd* 41 N.Y.2d 1086, 396 N.Y.S.2d 363 (Ct.App. 1977), a device defendants used in their civil service proceeding.

The New York courts and the state disciplinary agency have also demanded accurate and reliable medical records, of which more below.

To carry out the letter and spirit of Appellate Division's *Carlen* decisions, a physician employed by a health department who receives professional orders he disagrees with must misrepresent his true opinion to his patient, and under color of this deceitfully obtained consent, must give the treatment he considers harmful, all the while saying nothing on the medical record about what he really thinks, to mislead other doctors who must rely upon it.

What is the chance, then, that the *Carlen* decisions, if relied upon by other county physicians, will protect them in the New York courts against suit, license revocation and even criminal prosecution for deliberate tort (*People v. Einaugler*, 618 N.Y.S.2d 414 (A.D. 2 Dept. 1994))? None. These decisions represent a radical departure from the common understanding of medical obligation, of what physicians must and must not do.

But there is no need to speculate. New York State's wholly

opposed view of physicians' duties, which we have already explained in detail, is enough to destroy confidence in the Appellate Division's view of the New York law. The state courts have already rejected, and would continue to reject, this kind of Nuremberg defense. The *Carlen* decisions are thus entitled to no faith and no credit in the federal courts.

By letting the state court decisions stand as the correct interpretation of the intertwined federal issues and as a guide to Dr. Carlen's successor physicians, the Second Circuit has, in effect, pledged to accept "just following orders" as their complete defense in a civil or criminal federal case.

One other point. As a winner with the state health department (OPMC), Dr. Carlen had no grounds to appeal its decision, and thus had no opportunity to obtain appellate confirmation of his view of the state law and the intertwined constitutional issues. Had he breached the state's standards by obeying Dr. Harris, he would have found out all too quickly what New York law and the U.S. Constitution demand.

POINT III

DR. CARLEN ALLEGES VIOLATIONS OF FUNDAMENTAL CONSTITUTIONAL RIGHTS WITHIN THE FEDERAL COURTS' JURISDICTION

A) First Amendment

The quality of medical care in a public facility (especially in one like a jail, whose patients must accept its care), is a matter of public interest (*Rookard v. Health and Hospitals Corp.*, 710 F.2d 41 (2d Cir. 1983); *Buschi v. Kirven*, 775 F.2d 1240 (4th Cir. 1985), at 1248; *Frazier v. King*, 873 F.2d 820 (5th Cir. 1989), at

825; *Roth v. Veteran's Administration of the Government of the United States*, 856 F2d 1401 (9th Cir. 1988), at 1406)). Dr. Carlen had a right to protest, and to refuse to cooperate with, the defendants' improper medical recordkeeping policy, and his doing so quietly within the department (instead of publicly) is fully protected (*Givhan v. Western Line Consolidated School District*, 439 U.S. 410, 99 S.Ct. 693, 58 L.Ed.2d 619 (1979).

> [I]nformation relating to alleged governmental misconduct [is] speech which has traditionally been recognized as lying at the core of the First Amendment (*Butterworth v. Smith*, 494 U.S. 624, 632, 110 S.Ct. 1376, 108 L.Ed.2d 572 (1990)).

Dr. Carlen also had a First Amendment right to seek guidance from the state licensing agency about proper professional conduct, without retaliation. What its commissioner declared to be a "fundamental principle" of medical practice is surely a matter of public interest, especially in view of the large and ever-increasing number of American physicians who practice as employees.

B) Eighth Amendment

Constitutionally adequate care requires honest medical records and honest professional advice.

1) Honest medical records

N.Y. Education Law 6530(32) provides that it is professional misconduct to fail "to maintain a record of each patient which accurately reflects...evaluation and treatment."

> "The purpose behind the requirement that a proper record be kept for each patient (8 NYCRR 29.2[a][3]) is in part to ensure that meaningful

> information is recorded in case the patient should transfer to another professional or the treating practitioner should become unavailable*** *Matter of Suslovich v. New York State Educ. Dept.*, 174 A.D.2d 802, 803, 571 N.Y.S.2d 123...)." A medical record that fails to convey objectively meaningful medical information concerning the patient treated to other physicians is inadequate (*Mucciolo v. Fernandez*, 195 A.D.2d 623, 599 N.Y.S.2d 757 (A.D. 3 Dept 1993 [citation omitted])).

See also, *Bogdan v. New York State Board for Professional Medical Conduct*, 195 A.D.2d 86, 606 N.Y.S.2d 381 (A.D. 3 Dept 1993) and *Amarnick v. Sobol*, 185 A.D.2d 485, 586 N.Y.S.2d 356 (A.D. 3 Dept 1992).

The defendants' steadfast position on leaving embarrassments out of its medical records is precisely opposite to what it told New York Supreme Court in *People v. Smithtown General Hospital*, 93 Misc.2d 736, 402 N.Y.S.2d 318 (1978). A Smithtown surgeon was indicted for omitting mention of complications in his report. A representative of the Suffolk health department testified that such complications should have been included. Judge Jaspan ruled that protection against a malpractice suit, the intent repeatedly asserted by this very same department throughout the present controversy, "[made] little difference" (323, 324).

A patient's future physicians must, and do, rely upon the accuracy and completeness of the medical record. Dr. Carlen testified that the writing of notes to a private file, as Dr. Steibel said he could do, was a sham, a device to defeat communication, and nothing he had ever heard of.

Inadequate medical notes have already been held to be an

Eighth Amendment violation (*Todaro v. Ward*, 565 F.2d 48, 51 (FN2), (2nd Cir. 1977)). False records are a malcommunication to patients, itself an Eighth Amendment violation (*Hathaway v. Coughlin*, 37 F.3d 63 (2nd Cir. 1994)).

Transfer of medical information is not a rare or theoretical event, but occurs every day as required by N.Y. Corrections Law sec. 601(a), when county prisoners are sent into state custody.

2) Good-faith professional treatment and advice

Dr. Judith Feldman, defendant's Director of Adult Services and Dr. Harris's lead witness, admitted that Dr. Carlen could not ethically follow another physician's orders (tr. Apr. 29, 1988, 13:9-12). So did Dr. Greenberg (tr. Apr. 29, 1988, 60:5--61:8). Not even an at-will professional employee could be fired for adhering to a code of ethics (*Wieder v. Skala*, 80 N.Y.2d 628, 635, 637, 593 N.Y.S.2d 752, 755, 756 (Ct.App. 1992), 609 N.E.2d 105).

"[D]eliberate indifference to serious medical needs of prisoners" is proscribed by the Eighth Amendment (*Estelle v. Gamble*, 429 U.S. 97, 104, 97 S.Ct. 285, 291 (1976). Like everyone else, prisoners have a serious need for trustworthy physicians. Dr. Carlen could have kept his job by recommending to his patients treatment he believed could be of less benefit or even harm to them, all the while pretending otherwise, and of course saying nothing on their medical record. In short, he had to deceive, conceal, and expose his patients to the harms caused by malcommunication -- via the medical record -- with their future physicians. Such acts raise "the taint of depravity ... that a viable Eighth Amendment claim entails" (*Hathaway* at 71, Justice Jacobs in dissent).

"That the Eighth Amendment protects against future harm to inmates is not a novel proposition" (*Helling v. McKinney*, U.S. Supreme Court No. 91-1958, 1993 U.S. Lexis 4210).

These dangers of the defendants' policies are self-evident,

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and are certainly apparent to physicians like Dr. Harris. But in case he didn't know, his own experts, Drs. Williams and Greenberg, and even Dr. Feldman, could have enlightened him, as indicated above.

Dr. Carlen had a right, personal to him and secured by the Constitution, to refuse orders to violate his patients' Eighth Amendment right to adequate medical care (*Harley v. Schuylkill County*, 476 F.Supp. 191 (E.D. Pa.)).

As matters now stand, Dr. Carlen (or more properly, his successor at the Suffolk jail), in his official and his medical capacity, is required to go beyond *Estelle*'s deliberate indifference standard and willfully wreak harm on his patients. This shocks the conscience.

C.) Fourteenth Amendment

The defendants destroyed Dr. Carlen's professional career through admittedly dishonest legal process (substantive due process violation), for their ulterior and repeatedly declared motive of protecting themselves against suits by prisoners.

POINT IV

PLAINTIFF, FIRED FOR EXERCISING HIS FUNDAMENTAL CONSTITUTIONAL RIGHTS, IS ENTITLED TO A FEDERAL TRIAL ON HIS SUBSTANTIVE DUE PROCESS CLAIM, REGARDLESS OF ANY STATE REMEDIES

The civil service proceeding was a hoax, perpetrated by defendants to permit them to continue their constitutional violations without being burdened by a physician who insisted on his constitutional rights. Half the verdicts (those of professional

incompetence) were admittedly dishonest.

Where there is a violation of fundamental constitutional rights (First and Eighth amendments, *see, Palko v. Connecticut*, 302 U.S. 319, 58 S.Ct. 149 (1937)), plaintiff is entitled to a federal trial irrespective of available state remedies.

The state courts cannot provide relief where the state court process itself has been abused. "Intentional, substantive violations of constitutional rights are not subject to the rule of *Parratt*" [*Parratt v. Taylor*, 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981), adequate state post-deprivation remedy for random, unauthorized act] (*Morello v. James*, 810 F.2d 344, 348 (2nd Cir. 1987)).

> Overlapping state remedies are generally irrelevant to the question of the existence of a cause of action under sec. 1983...
> The [Due Process] Clause incorporates many of the specific protections defined in the Bill of Rights...[T]he Due Process Clause contains a substantive component that bars certain arbitrary, wrongful government actions regardless of the fairness of the procedures used to implement them...[T]he constitutional violation actionable under sec. 1983 is complete when the wrongful action is taken (*Zinermon v. Burch*, 494 U.S. 113, 110 S.Ct. 975, 982, 108 L.Ed.2d 100 (1990), internal quotation marks and citations omitted).

CONCLUSION

Should an employed physician put his employer ahead of his patients or his patients ahead of his employer? This novel question has increased in importance in the ten years since this litigation began, because a large and increasing number of American physicians, if not already a majority, are now employees.

To the ramifications of this question under New York law, two forums have given hopelessly contradictory answers, leaving the intertwined constitutional issues completely in doubt.

APPENDIX A

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Unpublished Disposition

(Cite as: 1996 WL 547199 (2nd Cir.(N.Y.)))

NOTICE: THIS SUMMARY ORDER MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY, BUT MAY BE CALLED TO THE ATTENTION OF THE COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA. SEE SECOND CIRCUIT RULE 0.23.

NOTE: THIS OPINION WILL NOT BE PUBLISHED IN A PRINTED VOLUME. THE DECISION WILL APPEAR IN TABLES PUBLISHED PERIODICALLY.

Robert **CARLEN**, M.D., Plaintiff-Appellant,
v.
DEPARTMENT OF HEALTH SERVICES; David **Harris**, M.D., individually and as former Commissioner of the **Suffolk** County Department of Health Services; **Suffolk** County, Defendants-Appellees.

No. 96-7179.

United States Court of Appeals, Second Circuit.

Sept. 26, 1996.

Appeal from the United States District Court for the Eastern

District of New York (Wexler, Judge).

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York and was argued.

ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the judgment of the District Court is hereby affirmed.

E.D.N.Y.

AFFIRMED.

Appearing for Appellant: Kathleen A. Carlsson, Sayville, New York. Appearing for Appellees: Jeltje deJong, Assistant County Attorney, Hauppauge, New York.

Before MESKILL, WINTER and CABRANES, JJ.

*1 Robert **Carlen** appeals from Judge Wexler's dismissal of his complaint pursuant to Federal Rule of Civil Procedure 12(c). **Carlen,** a physician formerly employed by the **Suffolk** County Department of Health Services, brought this action under 42 U.S.C. § 1983 asserting violations of his constitutional rights under the First, Fifth and Fourteenth Amendments, and "indirectly" under the Eighth Amendment.

Relying primarily on Davidson v. Capuano, 792 F.2d 275 (2d Cir.1986), **Carlen** argues that the Article 78 proceedings did not bar his present action under the principles of res judicata because the state court in the Article 78 proceeding did not have the power to award the monetary damages sought in the federal litigation. **Carlen,** however, confuses claim preclusion and issue preclusion. The district court correctly based its decision on the rules of issue preclusion; Davidson relates only to claim

preclusion.

The doctrine of res judicata, or claim preclusion, provides that a "final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action." Allen v. McCurry, 449 U.S. 90, 94 (1980); see also Burgos v. Hopkins, 14 F.3d 787, 789 (2d Cir.1994). The doctrine of issue preclusion, also referred to as collateral estoppel, is distinct. As defined in Allen, "[u]nder collateral estoppel, once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case." 449 U.S. at 94.

Different rules apply to each doctrine, and the precise preclusive effect of a New York judgment in a subsequent federal action must be determined in accordance with New York law. See 28 U.S.C. § 1738; Migra v. Warren City Sch. Dist. Bd. of Educ., 465 U.S. 75, 81 (1984). Under New York law "the doctrine of claim preclusion, which bars relitigation of causes of actions [sic], does not apply where the initial forum did not have the power to award the full measure of relief sought in the subsequent litigation." Rameau v. New York State Dep't of Health, 741 F.Supp. 68, 71 n. 2 (S.D.N.Y.1990). Davidson held that because damages for civil rights violations are not recoverable in an Article 78 proceeding, a judgment resulting from such a proceeding will not bar a subsequent federal action based on the same underlying facts and seeking that relief. 792 F.2d at 281-82.

However, the doctrine of issue preclusion under New York law is not similarly limited. "There are two requirements for the application of collateral estoppel to an issue: (1) '[t]here must be an identity of issue which has necessarily been decided in the prior action and is decisive of the present action,' and (2) 'there must have been a full and fair opportunity to contest the decision

now said to be controlling.' " Burgos, 14 F.3d at 792 (quoting Schwartz v. Pub. Adm'r, 24 N.Y.2d 65, 298 N.Y.S.2d 955, 960 (1969)).

*2 In Davis v. Halpern, 813 F.2d 37, 39 (2d Cir.1987), we held that although a judgment in a prior Article 78 proceeding is not a bar to a subsequent federal civil rights action under the doctrine of claim preclusion, federal plaintiffs are precluded from relitigating issues that were fully and fairly litigated and necessarily determined in the Article 78 proceeding. 813 F.2d at 39; see also Rameau, 741 F.Supp. at 70-71.

As the district court opinion makes clear, **Carlen's** substantive due process, First Amendment, and Equal Protection claims must be dismissed because they are based upon issues that have already been litigated in the Article 78 proceedings and decided against him. **Carlen** v. Dep't of Health Servs., 912 F.Supp. 35, 39-41 (E.D.N.Y.1996). Similarly, **Carlen's** "indirect" Eighth Amendment claims fail for lack of standing for the reasons stated by Judge Wexler. Id. at 42.

We therefore affirm for substantially the reasons stated by the district court.

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APPENDIX B

THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

GEORGE LANGE III
CLERK

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 8 day of November one thousand nine hundred and ninety-six.

_____	Dkt No: 96-7179
Carlen Plaintiff-Appellant v Dept of Health Svcs Defendant-Appellee _____	SEAL UNITED STATES COURT OF APPEALS SECOND CIRCUIT FILED NOV 08 1996 GEORGE LANGE III, CLERK

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by the appellant Robert Carlen, M.D.

Upon consideration by the panel that decided the appeal, it is

Ordered that said petition for rehearing is **DENIED.**

It is further noted-that the suggestion for rehearing in banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT
GEORGE LANGE III, Clerk

By: /s/ Beth J. Meador
Beth J. Meador,
Administrative Attorney

p o ccc
inbancdn-frm

APPENDIX C

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912 F.Supp. 35
(Cite as: 912 F.Supp. 35)

Robert CARLEN, M.D., Plaintiff,
v.
DEPARTMENT OF HEALTH SERVICES OF SUFFOLK COUNTY, NEW YORK, et al., Defendants.

No. CV 93-0187.

United States District Court,
E.D. New York.

Jan. 10, 1996.

Former prison physician sued county, county department of health services (DHS), and former commissioner of county DHS under § 1983, alleging violations of his constitutional rights to free speech, equal protection, and substantive due process, and also alleged claims based "indirectly" on Eighth Amendment rights of prisoner-patients to adequate medical care. On defendants' motion to dismiss or for summary judgment, the District Court, Wexler, J., held that: (1) substantive due process claim was barred by issue preclusion; (2) free speech claim was barred by issue preclusion; (3) equal protection claim failed to state claim upon which relief could be granted, and in the alternative was barred by issue preclusion; (4) physician did not have standing to assert claim for violation of Eighth Amendment rights of prisoners; and (5) claim for violation of physician's alleged constitutional right not to violate inmates' constitutional rights was barred by issue preclusion.

Motion granted.

[1] JUDGMENT k634
228k634
Former prison physician's substantive due process claim, based on charges of misconduct or incompetence brought against him, was barred under New York law by issue preclusion; state court had found that charges brought against him were supported by substantial evidence and were not in retaliation for commencement of state court proceeding, and there was no indication that he did not have full and fair opportunity to defend charges brought against him for a raise and to prove his retaliation claim. U.S.C.A. Const.Amend. 14.

[2] FEDERAL COURTS k420
170Bk420
Preclusive effect of New York judgment in subsequent federal action is determined by New York law. 28 U.S.C.A. § 1738.

[3] JUDGMENT k720
228k720
Under New York law, doctrine of collateral estoppel (issue preclusion) precludes party from relitigating in subsequent action or proceeding an issue clearly raised in prior action or proceeding and decided against that party or those in privity, whether or not tribunals or causes of action are the same.

[4] JUDGMENT k720
228k720
Under New York law, for issue preclusion to apply, there must be identity of issue which has necessarily been decided in prior action and is decisive of present action, and there must have been full and fair opportunity to contest decision now said to be controlling.

[5] JUDGMENT k720

228k720
First Amendment claim of former prison physician was barred under New York law pursuant to doctrine of issue preclusion; free speech claim was inextricably intertwined with, if not identical to, claim that he suffered retaliation for protesting alleged improper medical recordkeeping policy, which was decided adversely to him in state court, and he had full and fair opportunity to prove his retaliation claim. U.S.C.A. Const.Amend. 1.

[6] CIVIL RIGHTS k235(7)
78k235(7)
Former prison physician failed to state equal protection claim on which relief could be granted based on allegations that he was required to commit malpractice with regard to treatment of prisoners; he did not allege any disparate treatment based on invidious discrimination. U.S.C.A. Const.Amend. 14.

[7] JUDGMENT k720
228k720
Former prison physician's claim that he was denied equal protection of the laws governing medical practice in New York was barred under New York law by doctrine of issue preclusion, insofar as based on argument that as medical professional he could not be made subject to orders governing manner in which he was to provide treatment to prisoner-patients; that issue was decided adversely to him by state court, and he had full and fair opportunity to litigate issue. U.S.C.A. Const.Amend. 14.

[8] CONSTITUTIONAL LAW k42(1)
92k42(1)
Generally, litigant has no standing to assert constitutional rights of others.

[9] ACTION k13
13k13

To establish standing, plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on legal rights or interests of third parties.

[10] ACTION k13
13k13
In certain circumstances, plaintiff may be permitted to invoke court's jurisdiction where plaintiff's right to relief rests on legal right of third party.

[11] CIVIL RIGHTS k202
78k202
Former prison physician did not have standing to assert claim for violation of Eighth Amendment rights of inmates to adequate medical care, as assertion of jus tertii was not warranted; even acknowledging closeness of relationship of prison physician to third-party prisoner-patients, prisoner-patients were sufficiently able to assert their Eighth Amendment rights. U.S.C.A. Const.Amend. 8.

[12] JUDGMENT k720
228k720
Former prison physician's claim for violation of his constitutional right to refuse to violate inmates' constitutional rights was barred under New York law by doctrine of issue preclusion; state court rejected his claim that he could not be made subject to orders governing manner in which he was to provide treatment to prisoner-patients, and he had full and fair opportunity to litigate claim. U.S.C.A. Const.Amend. 8.
*36 Kathleen A. Carlsson, Sayville, New York, for plaintiff.

Robert J. Cimino, Suffolk County Attorney by Jeltje DeJong, Assistant County Attorney, Hauppauge, New York, for defendants.

MEMORANDUM AND ORDER

WEXLER, District Judge.

Plaintiff Robert Carlen, a physician formerly employed by the Suffolk County Department of Health Services, brings this action under 42 U.S.C. § 1983 against the County of Suffolk (the "County"), the Suffolk County Department of Health Services ("DHS"), and Dr. David Harris, individually and as the former Commissioner of DHS ("Commissioner Harris"). Plaintiff alleges violations of his constitutional rights under the First, Fifth and Fourteenth Amendments, and "indirectly" under the Eighth Amendment. Presently before the Court is defendants' motion to dismiss pursuant to Rule 12(b)(1) and (6) of Federal Rules of Civil Procedure or, in the alternative, for summary judgment under Rule 56 of the Federal Rules of Civil Procedure. Because defendants have already served an answer, their motion is one for judgment on the pleadings pursuant to Federal Rule of Civil Procedure 12(c). [FN1] For the reasons below, defendants' motion is granted.

> FN1. Plaintiff commenced this action by complaint dated January 14, 1993. Shortly thereafter, plaintiff filed an amended complaint dated January 19, 1993 (the "Amended Complaint"). Defendants filed their answer, and, following a stay of this action, now move against the Amended Complaint. In determining defendants' motion, the Court has considered only the pleadings and the matter submitted relevant to the state proceedings.

I. BACKGROUND

The facts alleged in the Amended Complaint can be summarized as follows. Plaintiff was formerly employed in a part-time civil service position by the DHS as a physician at the Suffolk County Correctional Facility ("SCCF"). See Amended Complaint ¶ 14-15. He was responsible for providing health services to prisoners

at the SCCF. Id. ¶ 5. At some point in and before 1986, a dispute arose over the extent of plaintiff's authority to use his best professional judgment in making patient medical chart entries and his duty to make other orders in his best professional judgment.

*37 Plaintiff claims that, beginning as early as 1984, plaintiff's superiors, including the Director of DHS's Division of Patient Care Services, Dr. William Steibel ("Dr. Steibel"), demanded that plaintiff follow orders that did not comport with plaintiff's professional judgment, including refraining from making patient chart entries that criticized the care being rendered and recording the "truth" in "private" files, and refraining from providing necessary counseling to patients. See id. ¶¶ 29-65, 69-77. Defendants' acts, plaintiff complains, were "efforts of defendants to cripple Dr. Carlen in his professional practice at the jail." Id. ¶ 69.

In March 1986, and again in July 1986, plaintiff wrote to the New York State Department of Education ("DOE"), asking "whether an employed physician was permitted to follow orders affecting patient care that he himself did not agree with." Id. ¶ 79. In response, by letter dated July 22, 1986, Commissioner Ambach of DOE allegedly wrote: "All physicians licensed to practice medicine in New York State are expected to provide the same level of care to all patients, regardless of the setting of their practice. This is a fundamental principle which cannot be compromised or abrogated under any circumstances." Id. ¶ 80 (the "July 22 DOE Letter"). Plaintiff sent a copy of the July 22 DOE Letter to Dr. Steibel in October 1986 and to Commissioner Harris in October 1987. Id. ¶ 81. Upon receiving this letter, Dr. Steibel immediately instituted the County's "Progressive Discipline System" against plaintiff, with the result that "everything about Dr. Carlen's work was attacked," despite plaintiff's previous satisfactory work evaluations. Id. ¶¶ 82, 88, 94-98.

According to plaintiff, "defendants and their 'colleagues, subordinates and employees' developed and enforced policies, plans and orders that would have the effect of depriving Suffolk prisoners of adequate medical care." Id. ¶ 20. Plaintiff, however, "stood in defendants' way by refusing to cooperate in their schemes. He repeatedly protested them, first within the department and, when that proved unavailing, to the New York State Supreme Court." Id. ¶ 21. Because plaintiff refused to comply with defendants' purported "schemes" concerning patient care, defendants "harassed plaintiff in his professional practice at the jail and attempted to coerce and frighten him into either obeying or resigning." Id. ¶ 24. As a result, on or about December 4, 1986, plaintiff commenced a proceeding pursuant to New York's Civil Practice Law & Rules ("CPLR") Article 78 in New York State court to enjoin Commissioner Harris, Dr. Steibel, and another of plaintiff's supervisors, Dr. Maury Greenberg ("Dr. Greenberg"), respondents therein, from interfering with plaintiff's professional judgment and performance of his professional duties in the treatment of SCCF patients. In the Article 78 proceeding, as alleged in the Amended Complaint, plaintiff

> alleged or offered documentary evidence of respondents' actions and policies in:
> a.) threatening him with job loss if he advised and counseled his AIDS- infected sexually active needle-using patient of his medical condition;
> b.) suppressing AIDS and hepatitis B education for prisoners at risk;
> c.) maintaining deliberately incomplete official medical records, with the truth recorded only in private files;
> d.) depriving prisoner E.W., who had multiple sequelae of a gunshot wound to his abdomen, of a nutritional supplement he vitally needed;
> e.) depriving prisoner M.V., who had repeated vomiting, weight loss and a history of stomach trouble, of a diet Dr. Carlen had ordered;

f.) depriving prisoner A.D. of a diet Dr. Carlen prescribed. A.D. had a history of ulcer and was doing well; his pain returned after Dr. Greenberg cancelled Dr. Carlen's diet;
g.) abandoning the Coumadin prisoner to mortal danger in the face of Dr. Carlen's warning;
h.) failing, on various occasions, to administer drugs Dr. Carlen prescribed, including special penicillin pills that were crucial to the care of one prisoner. Dr. Carlen stated that he never knew whether a medicine would reach a patient.

*38 Id. ¶ 83. Plaintiff maintains that these acts, which are alleged in further detail in the Amended Complaint, id. ¶¶ 29-58, 69-77, "constituted an official pattern and practice of deprivation of Suffolk prisoners' Eighth Amendment right to adequate medical care." Id. ¶ 84.

The Supreme Court, Suffolk County, denied the injunction and dismissed the Article 78 proceeding by order dated April 28, 1987, on the ground that plaintiff had failed to exhaust certain administrative remedies. By decision dated May 2, 1988, the Appellate Division, Second Department, upheld the dismissal of the Article 78 proceeding for failure to exhaust administrative remedies. See Carlen v. Harris, 140 A.D.2d 288, 527 N.Y.S.2d 538 (2d Dep't 1988), appeal denied, 73 N.Y.2d 709, 540 N.Y.S.2d 1004, 538 N.E.2d 356 (1989) ("Carlen I "). However, the Appellate Division further found that the petition failed to state a cause of action:

Over and above this flaw in the proceeding, we are of the view that the petition fails to state a cause of action. The respondents clearly had the authority to direct the manner in which the petitioner performed his duties. The petition and the papers submitted by the petitioner in response to the respondents' motion to dismiss fail to demonstrate that the respondents exceeded their authority in any way and is therefore insufficient as a matter of law.

Id. at 539 (citation omitted). Plaintiff was denied leave to appeal to the New York Court of Appeals.

Subsequently, and allegedly in retaliation for bringing the Article 78 proceeding, DHS charged plaintiff with 47 counts of misconduct and/or incompetence by notice dated January 15, 1988. Amended Complaint ¶ 99. These charges included: (1) failure to observe standard charting techniques; (2) disobedience to directives to participate in the "team approach to patient care"; (3) deviation from accepted medical practice; (4) refusal to accept medical supervision; and (5) refusal to provide care. Id. An administrative hearing pursuant to New York Civil Service Law section 75 was held on various dates between March 1988 and October 1989 (the "section 75 hearing"). In his Findings and Recommendations, dated January 23, 1990, a copy of which is attached to defendants' motion papers, the hearing officer dismissed the first count on consent as time barred, found plaintiff guilty of the remaining 46 counts, and recommended immediate termination (the "January 23, 1990 F & R"). As a threshold matter, the hearing officer rejected plaintiff's contention that the charges were brought against him in retaliation for his "whistle blowing activities," i.e., the Article 78 proceeding he had brought. The hearing officer also rejected plaintiff's arguments that the County had treated him disparately from others and that his supervisors could not issue him orders concerning medical care or make him perform medical procedures with which he disagrees. Commissioner Harris adopted the hearing officer's January 23, 1990 F & R, and, on February 13, 1990, terminated plaintiff from employment (the "February 13, 1990 Determination").

Plaintiff maintains that, contrary to Commissioner Harris' determination, Dr. Steibel informed plaintiff on February 13, 1990 that he was fired, but "repeated emphatically that [plaintiff's] competence was never in doubt." Id. ¶ 115. In addition, plaintiff alleges that before defendants brought charges against him and initiated the section 75 hearing, Dr. Greenberg caused the DHS's Office of Professional Medical Conduct ("OPMC") to investigate plaintiff. Id. ¶ 107. Although, the

OPMC subpoenaed (from DHS) and reviewed the same medical records at issue in the section 75 proceeding, Id. ¶ 108, by letter dated February 27, 1989, it informed plaintiff that it "determined that there is no evidence of professional misconduct and the investigation has been closed." Id. ¶ 109.

On or about June 4, 1990, plaintiff commenced a second Article 78 proceeding in state court against Commissioner Harris, this time to overturn the February 13, 1990 Determination. Plaintiff alleged that the section 75 hearing was initiated against him in retaliation for plaintiff's first Article 78 proceeding in violation of his state and federal constitutional rights to due process and equal protection, and that the hearing officer's*39 findings were arbitrary and capricious and an abuse of discretion. Pursuant to CPLR § 7804(g), the case was transferred to the Appellate Division, Second Department. The Appellate Division, Second Department, by order dated January 18, 1994, confirmed the February 13, 1990 Determination and dismissed the second Article 78 proceeding on the merits. See Carlen v. Harris, 200 A.D.2d 619, 608 N.Y.S.2d 851 (2d Dep't 1994) ("Carlen II "). The Appellate Division found that there was substantial evidence to support the findings of guilt and that there was no support for plaintiff's retaliation claim. The court stated:

> Each of the charges and specifications levied against the petitioner was amply supported by substantial evidence adduced and there is no support for the petitioner's speculative claims that he was being punished for bringing a previous proceeding pursuant to CPLR article 78 challenging the respondent's authority to direct the manner in which he provided treatment to County patients. In this regard, we note that we previously determined, as a matter of law, that the respondent had the authority to direct the manner in which the petitioner performed his duties, and that the petitioner's arguments set forth in the instant proceeding virtually mirror those propounded and rejected earlier [in Carlen I].

Id. at 851. Plaintiff's request for leave to appeal the Appellate

Division's decision in Carlen II to the New York Court of Appeals was denied.

Prior to any decision by the Appellate Division on the second Article 78 proceeding, plaintiff commenced this action pursuant to 42 U.S.C. § 1983, asserting claims based on the First, Fifth and Fourteenth Amendments for violations of his constitutional rights to free speech, equal protection, and substantive due process, and claims based "indirectly" on the Eighth Amendment rights of his prisoner-patients to adequate medical care. Plaintiff requests declaratory, monetary and injunctive relief seeking, among other things, annulment of the Commissioner's February 13, 1990 Determination terminating his employment, reinstatement with back pay, an order prohibiting defendants from continuing to deprive plaintiff and SCCF prisoners of their constitutional rights, compensatory damages, and attorney's fees.

After defendants filed the present motion, this Court stayed this action pending plaintiff's request for leave to appeal the Appellate Division's decision in Carlen II to the New York Court of Appeals, and defendants withdrew their motion without prejudice and with leave to renew. Following the denial of the request for leave to appeal, the stay of this action was lifted and defendants renewed their motion. Defendants argue that each of plaintiff's claims must be dismissed, whether under the doctrine of issue preclusion (collateral estoppel), for failure to state a claim for relief or for lack of jurisdiction.

II. DISCUSSION

A. Substantive Due Process Claim

[1][2][3][4] As for plaintiff's substantive due process claim, this claim is barred under the doctrine of issue preclusion. The preclusive effect of a New York judgment in a subsequent federal action is determined by New York law. See 28 U.S.C. § 1738; Migra v. Warren City School Dist. Bd. of Educ., 465 U.S. 75,

81, 104 S.Ct. 892, 896, 79 L.Ed.2d 56 (1984)). Under New York law, "the doctrine of collateral estoppel [issue preclusion] 'precludes a party from relitigating in a subsequent action or proceeding an issue clearly raised in a prior action or proceeding and decided against that party or those in privity, whether or not the tribunals or causes of action are the same.' " Burgos v. Hopkins, 14 F.3d 787, 792 (2d Cir.1994) (quoting Ryan v. New York Telephone Co., 62 N.Y.2d 494, 478 N.Y.S.2d 823, 826, 467 N.E.2d 487, 490 (1984)). For issue preclusion to apply, the following requirements must be met:

> (1) "there must be an identity of issue which has necessarily been decided in the prior action and is decisive of the present action," and (2) "there must have been a full and fair opportunity to contest the decision now said to be controlling."

Id. (quoting Schwartz v. Public Administrator, 24 N.Y.2d 65, 298 N.Y.S.2d 955, 960, 246 N.E.2d 725 (1969)); Davis v. Halpern, 813 F.2d 37, 39 (2d Cir.1987); Rameau v. New *40 York State Dep't of Health, 741 F.Supp. 68, 70-71 (S.D.N.Y.1990).

The Appellate Division in Carlen II found that "[e]ach of the charges and specifications levied against the petitioner was amply supported by substantial evidence." Carlen II, 608 N.Y.S.2d at 851. The court also found that the charges brought against plaintiff were not in retaliation for his commencing the first state court Article 78 proceeding. Id. There is no indication that plaintiff did not have a full and fair opportunity to defend the charges brought against him or to raise and prove his retaliation claim, particularly considering that he was represented by counsel throughout the administrative and state court proceedings. These findings from the Article 78 proceeding are binding on plaintiff and preclude a determination by this Court that the Commissioner's February 13, 1990 Determination was arbitrary and capricious or a pretext for retaliation against plaintiff, i.e., that it violated plaintiff's substantive due process rights. See, e.g., Morpurgo v. Board of Higher Educ., 423 F.Supp. 704,

709-10 (S.D.N.Y.1976) (giving preclusive effect to determination in Article 78 proceeding that defendants did not act arbitrarily or capriciously in terminating plaintiff and that plaintiff's termination was not in retaliation for plaintiff's civil rights activities). In addition, any claim by plaintiff that, as a medical professional, he cannot be made subject to orders governing the manner in which he was to provide treatment to prisoner-patients was also decided--adversely to plaintiff--by the state court, see Carlen II, 608 N.Y.S.2d at 851 (citing Carlen I, 527 N.Y.S.2d at 539), and precludes relitigation of that issue in this Court.

Plaintiff argues that the state case is "not relevant to th[is] federal case" because "this federal case is not based on the identical facts as the state case." See Letter from Plaintiff's Counsel to the Court, dated February 7, 1994, at 1; Plaintiff's Memorandum of Law, dated April 11, 1995, at 2-3 ("Pl. April 11, 1995 Mem."). In this respect, plaintiff contends that this § 1983 action includes certain "events that occurred outside of, and after [the section 75 hearing] record was made, and which were not and could not be known to the Appellate Division," namely, the OPMC's February 27, 1989 determination and the purported admission by Dr. Steibel on February 13, 1990. In addition, plaintiff argues that this "new evidence" would "provide a compelling theory that the original proceeding failed to provide due process because it was a hoax, instituted solely to conceal acts which could subject the County to claims by prisoners." Pl. April 11, 1995 Mem. at 2. This Court is not persuaded by plaintiff's argument. These "events" do not entitle plaintiff to a redetermination by this Court of the administrative and state court determinations. Contrary to plaintiff's statement, the OPMC issued its determination almost one year before the decision in the section 75 hearing. As for Dr. Steibel's purported admission, plaintiff alleges it was made at the time of Commissioner Harris' decision to terminate him, which was several months prior to the second Article 78 proceeding. Plaintiff, however, offers no reason for failing to attempt to

reopen the section 75 hearing record to raise that purported "new evidence." Accordingly, plaintiff's substantive due process claim must be dismissed.

B. First Amendment Claim

[5] As for plaintiff's First Amendment claim, this Court finds that issue preclusion also bars this claim. Plaintiff argues that he asserts a violation of his right of free speech to protest "a public issue," namely, the "quality of medical care in a public facility, and a "right to seek guidance from the state licensing agency about proper professional conduct, without retaliation." Pl. April 11, 1995 Mem. at 9-10; Amended Complaint ¶¶ 20- 23. Plaintiff argues that his protests (initially within the DHS, then to the Commissioner of Education, and finally to the New York State courts), based on his refusal to cooperate in any way in "defendants' improper medical record keeping policy," Pl. April 11, 1995 Mem. at 9, "are protected by the First Amendment; they may not furnish the basis for his dismissal from public employment." Plaintiff's Memorandum of Law, dated July 9, 1993, at 12.

The Appellate Division's finding in Carlen II that there was no support for plaintiff's retaliation claim, see Carlen II, 608 N.Y.S.2d *41 at 851, precludes plaintiff's free speech claim. Plaintiff's free speech claim is inextricably intertwined with, if not identical to, his claim that he was retaliated against for protesting defendants' alleged "improper medical record keeping policy." See Supplemental Memorandum of Law in Support of Defendants' Motion for Summary Judgment, Exh. C, at 3 (plaintiff's Petition in second Article 78 proceeding). As noted above, plaintiff had a full and fair opportunity to prove his retaliation claim.

The decision in Rameau is instructive on this issue. In Rameau, the district court held that determinations in an Article 78

proceeding barred a subsequent § 1983 claim of retaliatory discharge based on race and ethnicity. Plaintiff Rameau, a probationary state employee, challenged his termination in an Article 78 proceeding claiming, inter alia, that the termination was arbitrary, capricious, unlawful and in bad faith because it was based on racial and ethnic discrimination. In holding Rameau's racial discrimination claim barred, the district court stated:

> In the Article 78 proceeding, the plaintiff claimed that his dismissal was arbitrary, capricious, unlawful and made in bad faith because it was based on racial and ethnic discrimination. Had the state court found that the allegations of discrimination were supported by the facts it could not have found that plaintiff was properly discharged. Therefore, the finding that plaintiff's dismissal was not based on race or ethnicity was essential to the state court's holding and that claim therefore cannot be relitigated here.
>
> . . . . .
>
> Accordingly, all claims in the Federal Complaint founded upon allegations that plaintiff's termination was racially motivated are precluded by the state court judgment, i.e., plaintiff's request for reinstatement with back pay and declaratory relief and damages to the extent that they arise from plaintiff's termination.

Rameau, 741 F.Supp. at 71-72 (emphasis in original).

Here, plaintiff failed to prove that his termination was in retaliation for his protests of defendants' policies. Thus, the state court's rejection of his retaliation claim is binding on plaintiff and precludes any claim that defendants brought charges against him and terminated him in retaliation for his exercising free speech. Accordingly, plaintiff's free speech claim must be dismissed.

C. Equal Protection Claim

[6][7] Plaintiff claims that he was denied "equal protection of the laws governing medical practice in New York ... in that he was required to commit malpractice in furtherance of Drs. Harris and Steibel's cover-up efforts." Amended Complaint ¶ 66. He asserts that his "medical license and reputation would be at risk for participating, as a joint tortfeasor, in defendants' deprivation, especially because he was not permitted to state his disagreements on the official medical records, and thus could not protect himself in a lawsuit or other proceeding against him." Id. ¶¶ 28, 66-68.

Plaintiff's allegations are not sufficient to state a claim for denial of equal protection. Plaintiff does not allege that he was treated differently from other similarly situated County-employed physicians or that he was discriminated against because he was a member of a certain class; he simply does not allege any disparate treatment based upon invidious discrimination. See Reed v. Reed, 404 U.S. 71, 75-76, 92 S.Ct. 251, 253-54, 30 L.Ed.2d 225 (1971) (Equal Protection Clause requires that persons similarly situated be treated equally); North Star Contracting Corp. v. Long Island R.R., 723 F.Supp. 902, 911 (E.D.N.Y.1989). In addition, any such claim grounded in plaintiff's argument that, as a medical professional, he cannot be made subject to orders governing the manner in which he was to provide treatment to prisoner-patients was decided by the state court, see Carlen II, 608 N.Y.S.2d at 851 (citing Carlen I, 527 N.Y.S.2d at 539), and precludes relitigation of that issue in this Court. Accordingly, plaintiff's equal protection claim fails as a matter of law.

D. Eighth Amendment Claims

Lastly, as for plaintiff's Eighth Amendment claims, plaintiff contends that he brings *42 two claims based indirectly on the Eighth Amendment: first, plaintiff claims that defendants violated SCCF inmates' Eighth Amendment rights to adequate medical care, see Estelle v. Gamble, 429 U.S. 97, 97 S.Ct. 285, 50

L.Ed.2d 251 (1976); and second, plaintiff claims that defendants violated plaintiff's constitutional right to refuse to violate another's constitutional rights, i.e., the inmates' Eighth Amendment rights to adequate medical care.

[8][9][10] As a general rule, a litigant has no standing to assert the constitutional rights of others. Warth v. Seldin, 422 U.S. 490, 499, 95 S.Ct. 2197, 2205, 45 L.Ed.2d 343 (1975). To establish standing, "plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." Id. In certain circumstances a plaintiff may be permitted to invoke the court's jurisdiction where plaintiff's right to relief rests on the legal right of a third party. See, e.g., Singleton v. Wulff, 428 U.S. 106, 112-16, 96 S.Ct. 2868, 2873-75, 49 L.Ed.2d 826 (1976). As stated by the Supreme Court in Singleton:

> [T]he Court has looked primarily to two factual elements to determine whether the rule should apply in a particular case. The first is the relationship of the litigant to the person whose right he seeks to assert. If the enjoyment of the right is inextricably bound up with the activity the litigant wishes to pursue, the court can at least be sure that its construction of the right is not unnecessary in the sense that the right's enjoyment will be unaffected by the outcome of the suit. Furthermore, the relationship between the litigant and the third party may be such that the former is fully, or very nearly, as effective a proponent of the right as the latter....
>
> The other factual element to which the Court has looked is the ability of the third party to assert his own right. Even where the relationship is close, the reasons for requiring persons to assert their own rights will generally still apply. If their is some genuine obstacle to such assertion, however, the third party's absence from court loses its tendency to suggest that his right is not truly at stake, or truly important to him, and the party who is in court becomes by default the right's best available proponent.

Id. at 114-16, 96 S.Ct. at 2874-75.

[11] Upon consideration, this Court finds that assertion of jus tertii is not proper in this case. Even acknowledging the closeness of the relationship of a prison physician to third-party prisoner-patients, the prisoner-patients are sufficiently able to assert their Eighth Amendment rights without genuine obstacle to such assertion. Consequently, plaintiff does not have standing to assert a claim that defendants' violated the Eighth Amendment rights of SCCF inmates to adequate medical care.

[12] As for plaintiff's claim that defendants violated his constitutional right to refuse to violate SCCF inmates' constitutional rights, even assuming plaintiff has such a constitutional right, see Harley v. Schuylkill County, 476 F.Supp. 191 (E.D.Pa.1979), the state court's determination in Carlen II bars plaintiff's claim that he was terminated for refusing to violate the inmates' Eighth Amendment rights. Notably, in the second Article 78 proceeding plaintiff claimed that his termination was "retaliatory and ... [t]he charges were a sham ... to prevent him from exercising his professional judgment in the care of his patients and to stop him from protecting his patients' interest"-- which, obviously, he claims he refused to do. The Article 78 court's rejection of plaintiff's claims, including his claim that he cannot be made subject to orders governing the manner in which he was to provide treatment to prisoner-patients, see Carlen II, 608 N.Y.S.2d at 851, necessarily includes rejection of any claim that plaintiff was terminated because he refused to forego protecting his prisoner-patients' interests in their medical care. Any such claim by plaintiff is inextricably intertwined with the prior determinations, and would amount to a retrial of issues previously decided, let alone an impermissible review of those determinations by this Court.

Accordingly, plaintiff's claims based indirectly on the Eighth Amendment are dismissed.

*43 CONCLUSION

For the reasons above, defendants' motion is granted, and the Amended Complaint is dismissed. The Clerk of the Court is directed to enter judgment dismissing the Amended Complaint and to close the file in this case.

SO ORDERED.

END OF DOCUMENT

APPENDIX D

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615 N.Y.S.2d 874, 83 N.Y.2d 757, Carlen v. Harris, (N.Y. 1994)

*874 615 N.Y.S.2d 874

83 N.Y.2d 757, 639 N.E.2d 415

Matter of **Carlen**
v.
Harris

Court of Appeals of New York
June 14, 1994

200 A.D.2d 619, 608 N.Y.S.2d 851

MOTION FOR LEAVE TO APPEAL, GRANTED OR DENIED.

Denied.

(The decision of the Court of Appeals of New York is referenced in the New York Supplement and North Eastern Reporter in a 'Table of Decisions Without Published Opinions'.)

APPENDIX E

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608 N.Y.S.2d 851, 200 A.D.2d 619, Carlen v. Harris, (N.Y.A.D. 2 Dept. 1994)

*851 608 N.Y.S.2d 851

200 A.D.2d 619

In the Matter of Robert CARLEN, Petitioner,
v.
David HARRIS, Respondent.

Supreme Court of New York, Appellate Division, Second Department.

Jan. 18, 1994.

Kathleen A. Carlsson, Sayville, for petitioner.

Robert J. Cimino, County Atty., Hauppauge (Martha M. Rogers, of counsel), for respondent.

Brown & Brown, P.S.C., Lexington, KY (Kent Masterson Brown and Christopher J. Shaughnessy, of counsel), for Association of American Physicians and Surgeons, Inc., amicus curiae.

Proceeding pursuant to CPLR article 78 to review a determination of the Commissioner[200 A.D.2d 620] of the Suffolk County Department of Health Services, dated February 13, 1990, which, after a hearing, found the petitioner guilty of misconduct and/or incompetence and terminated his employment

as a physician with the Suffolk County Department of Health Services.

ADJUDGED that the determination is confirmed and the proceeding is dismissed on the merits, with costs.

It is well established that judicial review pursuant to CPLR article 78 of an administrative determination is limited, and a factual determination will be upheld if it is supported by substantial evidence, even if the record contains evidence to support a contrary conclusion (*see, Matter of Rivera [State Line Delivery Serv.--Roberts]*, 69 N.Y.2d 679, 512 N.Y.S.2d 14, 504 N.E.2d 381, *cert. denied* 481 U.S. 1049, 107 S.Ct. 2181, 95 L.Ed.2d 837; *Matter of Silberfarb v. Board of Coop. Educ. Servs.*, 60 N.Y.2d 979, 471 N.Y.S.2d 257, 459 N.E.2d 482; *Matter of Fazio v. Joy*, 58 N.Y.2d 674, 458 N.Y.S.2d 526, 444 N.E.2d 990; *300 Gramatan Ave. Assoc. v. State Div. of Human Rights*, 45 N.Y.2d 176, 408 N.Y.S.2d 54, 379 N.E.2d 1183; *Matter of Breger v. Macri*, 34 N.Y.2d 727, 357 N.Y.S.2d 494, 313 N.E.2d 788; *Matter of Colton v. Berman*, 21 N.Y.2d 322, 287 N.Y.S.2d 647, 234 N.E.2d 679; *Matter of Richcar Tavern, Inc. v. New York State Liq. Auth.*, 160 A.D.2d 881, 554 N.Y.S.2d 313; *Matter of Almo v. Shaffer*, 149 A.D.2d 417, 539 N.Y.S.2d 765). Issues of credibility are for the administrative agency to determine (*see, Matter of Belnord Holding Corp. v. Joy*, 73 A.D.2d 549, 423 N.Y.S.2d 3, *affd* 52 N.Y.2d 945, 437 N.Y.S.2d 968, 419 N.E.2d 871).

Each of the charges and specifications levied against the petitioner was amply supported by substantial evidence adduced and there is no support for the petitioner's speculative claims that he was being punished for bringing a previous proceeding pursuant to CPLR article 78 challenging the respondent's authority to direct the manner in which he provided treatment to County patients. In this regard, we note that we previously determined, as a matter of law, that the respondent had the

authority to direct the manner in which the petitioner performed his duties, and that the petitioner's arguments set forth in the instant proceeding virtually mirror those propounded and rejected earlier (*see, Carlen v. Harris,* 140 A.D.2d 288, 527 N.Y.S.2d 538).

ROSENBLATT, J.P., and RITTER, COPERTINO and JOY, JJ., concur.

APPENDIX F

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540 N.Y.S.2d 1004, 73 N.Y.2d 709, Carlen v. Harris, (N.Y. 1989)

***1004** 540 N.Y.S.2d 1004

73 N.Y.2d 709, 538 N.E.2d 356

Carlen (Robert)
v.
Harris (David)

NOS. 2-10, 281
COURT OF APPEALS OF NEW YORK
APR 06, 1989

140 A.D.2d 288, 527 N.Y.S.2d 538

MOTION FOR LEAVE TO APPEAL.

Denied.

(The decision of the Court of Appeals of New York is referenced in the New York Supplement and North Eastern Reporter in a 'Table of Decisions Without Published Opinions'.)

APPENDIX G

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527 N.Y.S.2d 538, 140 A.D.2d 288, Carlen v. Harris, (N.Y.A.D. 2 Dept. 1988)

*538 527 N.Y.S.2d 538

140 A.D.2d 288

Robert CARLEN, Appellant,
v.
David HARRIS, etc., et al., Respondents.

Supreme Court, Appellate Division,
Second Department.

May 2, 1988.

Prison physician brought Article 78 proceeding to prohibit commissioner of county department of health and his physician supervisors from interfering with his "professional judgment * * * and performance of his professional duties." The Supreme Court, Suffolk County, Cannavo, J., granted respondents' motion to dismiss petition on ground that prison physician had failed to exhaust his administrative remedies, and physician appealed. The Supreme Court, Appellate Division, held that: (1) physician's failure to exercise "the right to appeal any discipline imposed by * * * use of the discipline system to the Director of Personnel and Labor Relations," following verbal reprimand, constituted failure to exhaust administrative remedies, and (2) respondents had authority to direct manner in which physician performed his duties.

Affirmed.

1. LABOR RELATIONS k416.1
232A ----
232AVIII Alternative Dispute Resolution
232AVIII(A) In General
232Ak416 Availability of Judicial Remedies in General
232Ak416.1 Individual claims and grievances in general.
N.Y.A.D. 2 Dept. 1988.

Prison physician's failure to utilize grievance and arbitration procedures did not bar petition seeking to prohibit his physician/supervisors and commissioner of county department of health from interfering with his "professional judgment * * * and performance of his professional duties," where collective bargaining agreement specifically provided that management's right "to delegate * * * the manner of the performance" of its employees' duties was "not subject to grievance procedures or arbitration.".

2. LABOR RELATIONS k416.1
232A ----
232AVIII Alternative Dispute Resolution
232AVIII(A) In General
232Ak416 Availability of Judicial Remedies in General
232Ak416.1 Individual claims and grievances in general.
N.Y.A.D. 2 Dept. 1988.

Prison physician's failure to exercise "the right to appeal any discipline imposed by * * * use of the discipline system to the Director of Personnel and Labor Relations," following verbal reprimand, constituted failure to exhaust administrative remedies.

3. PRISONS k9
310 ----

310k5 Officers
310k9 Powers and duties.

N.Y.A.D. 2 Dept. 1988.

Commissioner of county department of health and physician/supervisors of prison physician had authority to direct manner in which prison physician performed his duties.

Carlsson & Carlsson, Sayville (Kathleen A. Carlsson, of counsel), for appellant.

Martin Bradley Ashare, Co. Atty., Hauppauge (Theodore D. Sklar, of counsel), for respondents.

[140 A.D.2d 289] Before MANGANO, J.P., and BRACKEN, SPATT and HARWOOD, JJ.

MEMORANDUM BY THE COURT.

In a proceeding pursuant to CPLR article 78 to prohibit the respondents from interfering with "Petitioner's professional judgment * * * and performance of his professional duties at the Suffolk County correctional facilities", the petitioner appeals from a judgment of the Supreme Court, Suffolk County (Cannavo, J.), entered May *539. 1, 1987, which granted the respondents' motion to dismiss the petition on the ground that that petitioner had failed to exhaust his administrative remedies.

ORDERED that the judgment is affirmed, with costs.

The petitioner, a licensed physician, is employed by the Suffolk County Department of Health (hereinafter the Department) to provide health care for the inmates at the correctional facility at Yaphank, New York. The respondents are the Commissioner of the Suffolk County Department of Health and two physicians who are the petitioner's supervisors.

In early December 1986 the petitioner commenced the instant proceeding pursuant to CPLR 7803(2), to prohibit the respondents from interfering with his "professional judgment * * * and performance of his professional duties". The petition set forth several instances where the respondents had allegedly interfered with the petitioner's professional judgment and treatment of his patients.

In their motion to dismiss the petition, the respondents argued that (1) the petition failed to state a claim upon which relief could be founded and (2) the petitioner had failed to exhaust his administrative remedies under a collective bargaining agreement between Suffolk County and the petitioner's collective bargaining unit, i.e. the Suffolk County Association of Municipal Employees, Inc. (hereinafter the Association).

The Supreme Court, Suffolk County, dismissed the petition on the ground that petitioner failed to exhaust his administrative remedies.

[1] With respect to the issue of exhaustion of administrative remedies, both the respondents and the Supreme Court, Suffolk County, relied on the fact that the petitioner had failed to utilize the grievance and arbitration procedures contained in the collective bargaining agreement. Pursuant to section 3 of the collective bargaining agreement, the county retained, without limitation, certain rights of management including, *inter alia*, the right "to delegate * * * the manner of the performance" of its employees' duties. However, section 3 of the collective bargaining agreement specifically provided that this right was "not subject to grievance procedures or arbitration". Therefore, the petitioner's failure to utilize those grievance and arbitration procedures does not bar judicial review.

[2] Nevertheless, the respondents also argue that on November 17, 1986, less than one month prior to the

commencement of the instant proceeding, the petitioner received a verbal reprimand from the respondents concerning virtually all of the areas of dispute between the parties herein, as alleged in the petition. This verbal reprimand is the first step in the Progressive Discipline System which is provided for in section 15 of [140 A.D.2d 290] the collective bargaining agreement. Pursuant to section 15 of the collective bargaining agreement, the Association has "the right to appeal any discipline imposed by * * * use of the discipline system to the Director of Personnel and Labor Relations". Since the petitioner has failed to utilize this procedure, the instant proceeding was properly dismissed for failure to exhaust administrative remedies (*see, Melton v. Town of Islip*, 78 A.D.2d 540, 432 N.Y.S.2d 97).

[3] Over and above this flaw in the proceeding, we are of the view that the petition fails to state a cause of action. The respondents clearly had the authority to direct the manner in which the petitioner performed his duties. The petition and the papers submitted by the petitioner in response to the respondents' motion to dismiss fail to demonstrate that the respondents exceeded their authority in any way and is therefore insufficient as a matter of law (*see, McGraw v. Shapiro*, 56 A.D.2d 624, 391 N.Y.S.2d 681).

APPENDIX H

SHORT FORM ORDER **INDEX NO. 22606 1986**

SUPREME COURT - STATE OF NEW YORK
SPECIAL TERM, PART III SUFFOLK COUNTY

Present:
Hon JACK J. CANNAVO **Justice**

MOTION DATE February 17, 1987
#16 & 17 - 3/20/87

PLTF'S ATTY:
CARLSSON & CARLSSON, ESQS.
17 Main Street
Sayville, New York 11782

ROBERT CARLEN,
Plaintiff

-against-

DEFT'S ATTY:
MARTIN BRADLEY ASHARE
SUFFOLK COUNTY ATTORNEY
Bldg. 158, North Complex
Veterans Memorial Highway
Hauppauge, New York 11788

DAVID HARRIS, Commissioner of the Suffolk County Department of Health Services, WILLIAM STEIBEL and MAURY GREENBERG,
Defendants

Upon the following papers numbered 1 to 34 read on this petition for an Article 78 proceeding and motion to dismiss Notice of Petition and supporting papers 1-18; Notice of Motion and supporting papers 19-30; Answering Affidavits and supporting

papers 34-36; Replying Affidavits and supporting papers 32; Other 31, 32, 33, 34; (and after hearing counsel in support of and opposed to the motion) it is,

ORDERED that this motion by the respondents for dismissal of the petition is granted.

The petitioner, Robert Carlen, has commenced this action to enjoin the Commissioner of Health Services from interfering with the petitioner's professional judgment in the treatment of patients and the performance of his professional judgment.

Petitioner is an employee of the County of Suffolk and, as part of his duties, he gives medical treatment to prisoners under the control of Suffolk County.

A public employee who has failed to avail himself of the greivance procedure outlined in a collective bargaining agreement may not seek relief by a CPLR Article 78 proceeding [Melton v. Town of Islip, 78 A.D.2d 540, 432 N.Y.S.2d 97]. The general rule that the petitioner must exhaust his administrative remedies before instituting an Article 78 proceeding need not be followed when an agency's action is alleged to be unconstitutional or wholly beyond its powers [Dineen v. Borghard, 100 A.D.2d 547, 473 N.Y.S.2d 247]. The petitioner does not allege that the respondent has acted in an unconstitutional manner, but he does state that the Commissioner has been acting illegally and beyond his power by interfering with petitioner's professional judgment in the treatment of patients and the performance of his professional duties.

The County, by its officials, is responsible for the maintenance and care of prisoners in the County Jail [Correction Law 500-c; Gordon v. City of New York, 102 A.D.2d 562, 502 N.Y.S.2d 215]. A prisoner has a fundamental right to reasonable and adequate medical care [Powlowski v. Wullich, 102 A.D.2d 575, 479 N.Y.S.2d 89]. In order for the County to violate a prisoners rights, there must be acts or ommissions on the part of prison officials which indicate "deliberate indifference to medical needs" [Ronson v. Commissioner of Correction, 112 A.D.2d 488, 491 N.Y.S.2d 209].

The person who must provide the care to the inmate is the prison physician. Prison physicians, even though he is an employee of the governmental authority supervising the prison, "owe no less duty to prisoners who must accept their care, than do private physicians to their patients who are free to choose" [Pisacano v. State of New York, 8 A.D.2d 335, 340, 188 N.Y.S.2d 35, 40; Bowers v. County of Essex, 118 Misc.2d 943, 461 N.Y.S.2d 959].

The petitioner, by consenting to employment by the County, has agreed to be bound by the provisions of the collective bargaining agreement entered into between the County and the Union representing County employees. This agreement provides that "any and all disputes arising out of or concerning the interpretation or application of the terms of the contract shall be processed" by the grievance procedure set forth in paragraph 13 of the agreement (Respondent's Exhibit 10).

Paragraph 13 of the collective bargaining agreement contains a comprehensive greivance procedure with the aggreived employee able to utilize three separate appeal procedures from the decision of his immediate supervisor.

One of the rights of the County as an employer is to "carry out the functions of management' (Respondent's Exhibit 10). When the function of management, herein the custody and control of prisoners in jail, comes in conflict with an employee's view of the duties that he is required to perform, both the employee and the County must utilize the remedies provided by the collective bargaining agreement [see Koonz v. Corrigan, 117 A.D.2d 912, 498 N.Y.S.2d 915, Prey V. Cattaraugus County, 79 A.D.2d 205, 436 N.Y.S.2d 476; Civil Service Law S200]. The respondent's motion to dismiss is granted since the petitioner has not exhausted his administrative remedies, and the County is not acting beyond its power by supervising an employee on the discharge of the County's ultimate responsibility to prisoners under its control.

COUNTY CLERK FILED DATE IS YOUR ENTRY DATE

Dated: April 28, 1987
FILED May 1 1987 JULIETTE A. KINSELLA Clerk of Suffolk County

/s/ Jack S. Cannavo
J.S.C.

APPENDIX I

COUNTY OF SUFFOLK
PATRICK G. HALPIN
SUFFOLK COUNTY EXECUTIVE

DEPARTMENT OF HEALTH SERVICES
DAVID HARRIS, M.D., M.P.H.
COMMISSIONER
February 13, 1990

Dr. Robert Carlen
17 Main Street
Sayville, N.Y. 11782

Dear Dr. Carlen:

On January 15, 1988 I directed Mr. Daniel A. Bahr, Director of Personnel and Labor Relations for Suffolk County, to hold a hearing pursuant to Section 75 of the Civil Service Law, on the Notice of Disciplinary Charges and Specifications, dated January 15, 1988 naming you as respondent. I further designated Mr. Bahr as the hearing officer.

The hearing commenced on March 16, 1988 and was completed on October 31, 1989, with numerous hearing sessions being convened at various times between those dates. On April 26, 1988 Specification I of Charge I was withdrawn.

On January 23, 1990 Mr. Bahr submitted his hearing officer's findings and recommendations. The hearing officer found that you are guilty of all charges and reccomends that you be terminated immdiately.

After careful review of the hearing officer's findings and recommendations, and the record of the hearing, including transcripts, exhibits and briefs of counsel, I adopt all findings of

fact and find you guilty on all charges and specifications.

Therefore, effective immediately you are terminated from your position as Physician with the Department of Health Services.

Under Section 76 of the Civil Service Law you are entitled to appeal this determination by application to the Suffolk County Civil Service Officer or to the courts. If you elect to appeal to the Civil Service Officer, such appeal must be filed, in writing, within (20) days after receipt of this determination.

Very truly yours,
/s/ David Harris MD
David Harris, M.D., M.P.H.
Commissioner

DH:dr
cc: J. Tempera
Alan Schneider
Thomas Boyle
Dr. W. Steibel
Desmond O'Sullivan
Personnel File
Kathleen Carlsson

225 Rabro Drive East
Hauppauge, N.Y. 11788-4290
(516) 348-2900

APPENDIX J

STATE OF NEW YORK: COUNTY OF SUFFOLK
SUFFOLK COUNTY DEPARTMENT OF HEALTH SERVICES

In The Matter of the Disciplinary Charges

-against-

Robert Carlen, M.D.

HEARING OFFICERS FINDINGS AND RECOMMENDATIONS

Preliminary Statement

Pursuant to Section 75 of the New York State Civil Service Law and the Collective Bargaining Agreement between the County Suffolk and the Suffolk County Association of Municipal Employees I was designated as Hearing Officer and directed to hold hearing pursuant to notice and charges dated January 15, 1988 and any amendments or supplements to said charges with regard to Dr. Robert Carlen. A copy of the Charges and Specifications is attached as Appendix #1. It should be noted that Charge I, Specification I was withdrawn by the County on April 26, 1988. (Transcript., 4/26/88, pp. 69-70).

In accordance with the above, hearings were held on the following dates:

[38 dates omitted]

It should be noted that the transcript of the June 1, 1988 hearing, consisting of part of Carlen's direct testimony, was never received because of the death of the reporter and the loss of her records. The hearing officer ruled that the testimony given on that date had to be reheard. (T., 3/22/89, pp. 6-16) There were no objections from either party.

At the hearings listed above the parties had full opportunity to present documentation, testimony and argument in support of their respective positions. In fact, the County of Suffolk (hereinafter, "the County") presented five witnesses and introduced forty-two exhibits. The Respondent, Dr. Carlen (hereinafter, "Carlen") presented four witnesses and introduced twenty-eight exhibits. The Hearing Officer introduced four additional exhibits. A complete list of all exhibits is attached as Appendix #2.

Appearances:

For the County:

E. Thomas Boyle, Esq., Suffolk County Attorney
By: Desmond O'Sullivan, Esq., Of Counsel
Judith Feldman, M.D.
Maury Greenberg, M.D.
Jordan Sklar, M.D.
William Steibel, M.D.
Peter Williams, Ph.D.

For the Respondent:

Kathleen Carlsson, Esq., Attorney for Dr. Robert Carlen
Robert Carlen, M.D., Respondent
Jane Orient, M.D.
Victor DuVall, M.D.
Allan Goldstein, M.D.

Discussion

This case presented a number of issues for the Hearing Officer's consideration. Apart from the obvious issues of guilt or innocence related to the Charges and Specifications, Carlen put forth a whistle blower defense pursuant to Section 75-b of the New York State Civil Service Law. This issue must be addressed first, because if I find merit in this claim then I must dismiss the Charges and Specifications In their entirety.

Section 75-b of the New York State Civil Service Law states that disciplinary action may not be taken against an employee as a result of that employee disclosing certain kinds of information to a governmental body. It is Carlen's claim that the Charges and Specifications in the instant case are the result of his "blowing the whistle" relative to the operation of the Department of Health Services (hereinafter, "the Department"). This alleged whistle blowing activity consisted of a lawsuit (Respondent's Exhibit T) filed against the officials of the Department. (T., 3/22/89, pp. 128, 132, 135-136)

With this claim, the burden of proof rests squarely on Carlen's shoulders. He must first prove that the court action constituted whistle blowing activity. If he is successful at this task he must also prove that, except for the court action, the Charges and Specifications would not have been filed.

It is my opinion that the lawsuit does not constitute whistle blowing activity. I believe that the evidence shows that Carlen filed the suit, not to report improper activity, but simply because he was displeased with the manner in which he was being treated and disagreed with the administrative and medical decisions being imposed upon him. In addition, Carlen has failed to prove that the lawsuit was the sole reason for the filing of the Charges and Specifications. It Is my opinion that the Department genuinely believed that Carlen was guilty of misconduct and/or incompetence and that he was warned against such conduct prior to the filing of the lawsuit. Even if the alleged conduct had followed the lawsuit, it was so serious that Charges and Specifications could reasonably

have been expected. Therefore, I must dismiss Carlen's whistle blower defense.

In dealing with the specific Charges and Specifications, I must first discuss two of Carlen's primary claims.

The first claim is so basic to his case that it runs consistently through his testimony and that of his witnesses and constitutes much of the foundation of his defense. While Carlen readily agrees that people like Dr. Greenberg, Dr. Steibel and Dr. Harris were his administrative superiors, he contends that no one was his medical superior. This claim was made as early as 1984. (T., 5/10/88, pp. 16-17). What this means is that, while the doctors mentioned above can issue him administrative directives which he must obey, they cannot order his to perform medical procedures with which he disagrees. This prohibition, says Carlen, even extends to the manner in which he makes entries into patient charts. (Respondent's Exhibit T) According to Carlen, the laws of New York State say that no employer can order his to go against his best Judgment. He denied having a professional supervisor (T., 5/13/88, p. 64) except for his "professional conscience." (T., 5/13/88, p. 63) His authority, he claims, is derived "...from the State of New York, which got it from the Colony of New York, which got it from the King of England, who got it from the Archbishop of Canterbury, who got it from the Pope, who got it from God..." (T., 5/13/88, p. 64).

Not so, claims the County. In an organization such as the Department of Health Services, employees, even physicians, cannot be allowed to carry out their functions without effective supervision. There is nothing in the law, claims the County, which would prohibit supervisory physicians from issuing medical orders to Carlen. Failure to carry out those orders would constitute Insubordination.

The County, in an effort to bolster Its position on this issue, presented the results of the court action which formed the basis of the whistle blower defense. (Respondent Exhibit T) Carlen's goal in this action was to "prohibit the respondents from interfering with 'Petitioner's professional judgment * * * and performance of his

professional duties at the Suffolk County correctional facilities.'" (County Exhibit #36) The Appellate Division found against Carlen (County Exhibit #36) and denied him leave to appeal to the Court of Appeals. (County Exhibit #37). In its Decision and Order the Appellate Division found the suit to be procedurally defective. However, in a parting shot the Court also said:

> "Over and above this flaw in the proceeding, we are of the view that the petition fails to state a cause of action. The respondents clearly had the authority to direct the manner in which the petitioner performed his duties. The petition and the papers submitted by the petitioner in response to the respondents' notion to dismiss fail to demonstrate that the respondents exceeded their authority in any way and is therefore insufficient as a matter of law (see, McGraw v Shapiro, 56 AD2d 624)." (County Exhibit #36)

The Court of Appeals also denied leave to appeal. (County Exhibit #41). The Court's findings, contends the County, must be considered dispositive of this issue.

I need not decide whether or not the Court's decision constitutes res judicata or collateral estoppal because I find that I agree with the Court's comments and the County's position. There is nothing in the record which has proven to me that the Department of Health Services does not have the authority to direct all of the activities of all of its employees. Carlen has not successfully offered proof that such action on the part of the Department would be illegal.

In summary, the issue before me is not whether or not the Department had the right to issue medical directives, but whether or not Carlen obeyed those directives.

The second claim is less pervasive than that which is discussed above. At times during the hearing process, Carlen had attempted to prove that the County was engaging in disparate treatment. His counsel, Ms. Carlsson, had argued that it was improper for the County to charge Carlen with misconduct and/or incompetence when other physicians were engaging in

unacceptable conduct and escaping discipline. This position, however, was fatally flawed. In order to prove disparate treatment, Carlsson would have had to show that other doctors were not disciplined after they had engaged in precisely the same actions as those for which Carlen had been charged. This burden was not met and I must dismiss the claim of disparate treatment.

There is one further concern with which to deal before moving on to the specific Charges and Specifications. I must discuss the witnesses provided by the parties.

Carlen's witnesses (Dr. Orient, Dr. DuVall and Dr. Goldstein) were out-of-town experts who were solicited to testify on his behalf. Goldstein received $1,000 per day (T., 6/9/88, p. 4) and Orient had received at least $500 and payment for a hotel room (T., 7/13/88, p. 20). She conceded that she agreed to testify even before reviewing the charts in question. (T., 7/13/88, p. 28) DuVall left his fee to the judgment of Carlen, but stated that his presence at the hearing would cause him to lose about $2,000 per day and that he hoped Carlen would reimburse him. (T., 9/2/88, pp. 28 & 30) He said that he had only done a small number of chart reviews and was not "... a professional chart reviewer." (T., 6/24/88, p. 4; T., 9/2/88, P. 6) In addition, less than 1% of his work was with prisoners (T., 6/24/88, p. 5), he was not an expert in the team approach (T., 6/24/88, p. 21) and he agreed to testify after seeing only "the pertinent progress notes" instead of the complete charts. (T., 9/2/88, p. 27) DuVall's impartiality came further into question when he testified that the Association of American Physicians and Surgeons put him into contact with Carlen because he keeps his records similarly In his private practice. (T., 9/2/88, p. 31) In this case, one could scarcely expect him to criticize Carlen's record-keeping techniques when such criticism would reflect on his own practices. Also, since he only "hoped" that Carlen would pay him, one might speculate that his testimony would be biased in order to convince Carlen to reimburse him for his expenses.

The County's witnesses were, in part, the Department employees who formulated the Charges (Dr. Feldman, Dr.

Greenberg, Dr. Stelbel and Dr. Sklar).

Much of the testimony presented to me was contradictory. Especially, when discussing Carlen's competence and his alleged deviations from accepted medical practice, Carlen's witnesses refuted the Charges and the Department's witnesses supported the Charges. (An Important exception involved Goldstein, who contradicted much of the testimony of Carlen's other experts and greatly supported the County's case.) When such a situation develops, the adjudicator can use a number of criteria to determine which witnesses to believe. I examined the motives and qualifications of the witnesses as well as their demeanor while on the witness stand. Carlen's witnesses were solicited by him and were hand-picked because they presumably supported his views. In at least two cases they received some form of compensation for their time and/or testimony. Dr. Orient was consistently evasive, hostile and routinely unresponsive in the face of reasonable questioning by Mr. O'Sullivan, counsel for the County. To a lesser extent the same thing can be said of Dr. DuVall. Carlen, himself, engaged in evasive tactics, often employing semantic reasons for not answering questions as requested. His consistent failure to answer simple questions cannot weigh in his favor. It is my opinion that these tactics were unwarranted and only served to lengthen the hearing process. In addition, on re-direct examination Carlen spent much of the time "correcting" the answers he gave on cross-examination.

On the other hand, the County's witnesses testified in a straight-forward manner and had no apparent motive other than the prosecution of a physician they considered less than competent. In the face of the motives, qualifications and demeanor of the witnesses and the fact that Goldstein contradicted much of the testimony offered by Carlen's other witnesses, I believe that the testimony of Orient and DuVall should carry minimal weight.

FINDINGS

The first Charge consisted of twenty-four specifications dealing with Carlen's alleged failure "...to observe standard charting techniques when making entries in a patient's record..." This

'Charge encompasses sixteen of the twenty-three patients and as many Specifications as all of the other Charges combined.

After reviewing the testimony it is clear that the County's position is that the "standard charting technique" meant the nationally recognized format which was standard in the Department pursuant to directives of the medical administrators, namely, the so-called SOAP system. According to Dr. Feldman (T., 4/29/99, p. 15) SOAP is not universal, but it is the best system. County witnesses consistently offered uncontroverted testimony that physicians were told that the SOAP system was to be utilized in all chart entries. Carlen was even admonished in 1984 and 1986 for not following the system. (T., 4/26/88, pp. 62-65; County Exhibits #25, 26, 33) It was the considered opinion of the Department that this system offered a method which allowed a doctor to efficiently record observations and information from a medical examination and to show changes at a later date. It forced a doctor to take an orderly approach to a clinical problem and was another way to allow doctors to communicate among themselves. Physicians offering follow-up medical care could look at a chart and understand the patient's condition as quickly as possible. (T., 4/26/88, pp. 66-6T)

It is true that Carlen and his witnesses vigorously disputed the worth of the SOAP system of charting. However, the Department has the responsibility of establishing procedures, including those relating to the recording of medical information. However, eventhough Carlen was obliged to follow those directives he admitted that he does not use the SOAP system. (T., 5/10/88, p. 58) Although it is undisputed that the SOAP system was discussed with Carlen and that he was admonished for not using it, Carlen testified that he couldn't use the SOAP system "...because it would disrupt my pattern of thinking" (T., 5/10/88, p. 72) and would destroy his professional thinking. (T., 5/10/88, p. 86) Contradicting all of this testimony, however, he later stated that he used the SOAP system for the 12/4/86 entry for patient #8 after he came to feel that Greenberg was "...looking for me..." He stated that he also used it because the patient "...had six different

problems and I set it up carefully..." (T., 6/27/89, pp. 92-94.). It should also be noted that DuVall testified that nothing in this SOAP entry indicated a disturbance or derailment in Carlen's thought process. (T., 9/18/89, pp. 29-30) This obviously shows that Carlen was perfectly capable of using the SOAP format and knew its worth, but, instead, chose not to do so. That is clear insubordination.

The record, therefore, illustrates that the Department was not being arbitrary or capricious in ordering physicians to use the SOAP system. However, the main issue is not whether the SOAP format is a wise choice, but whether or not the Department had the right to order Dr. Carlen to use it and then whether or not he complied with that order.

In January of 1986, the County had informed Carlen that he should not place extraneous notes in the records of patients. (County Exhibits #25 & 26) This concern was repeated by Dr. Steibel in the written reprimand of November 17, 1986, (County Exhibit #33) which repeated discussions which had taken place on November 7, 1986. This reprimand "again advised" Carlen that he must use the SOAP system of charting. The record supports the finding that the County did, indeed, have that right and that Carlen refused to comply.

I find that Carlen is guilty of all twenty-four Specifications contained in Charge 1.

The five specifications contained in Charge II deal withCarlen's alleged failure to participate in the team approach, despite written and verbal orders to do so, by withdrawing from the medical care of patients. The team approach, as described by Dr. Greenberg, simply refers to the situation in which more than one medical person is involved in the care of each patient. (County Exhibit #28) This same exhibit served as notice to Carlen that the team approach must be followed. In a meeting on November 7, 1986, confirmed in a memo of November 17, 1986 (County Exhibit #33) Carlen was reprimanded for not following the team approach. The testimony and evidence are clear in that Carlen was insubordinate when he

defied the Department's orders regarding the team approach. He testified that, "I won't participate in it." (T., 5/13/88, p. 68) Greenberg and Steibel had discussed the team concept with Carlen and had told him that he could not withdraw from a jail case because no other physician was available around the clock. (T., 4/28/88, pp. 87-88; County Exhibits #28 & 33) Carlen, however, states that he never withdrew from a case - Greenberg had taken over and forced him out. I believe that Carlen's position here depends upon the validity of his theory that he has no medical supervisor and that the moment another doctor becomes involved in the treatment of his patient, that doctor automatically supplants Carlen as the inmate's physician. Carlen, himself, expressed this to Greenberg on July 28, 1986 when he wrote:

> "Let me make it clear, too, that I believe you have every right to change or cancel my orders In any way you see fit. What that means, of course, is that I am defunct as that particular person's physician and you take over the care..." (County Exhibit #31)

and also earlier, on December 29, 1983, when he wrote in a chart:

> "Dr. Greenberg will be the doctor on this case, I am withdrawing since I disagree with his approach." T., 4/29/88, p. 4)

Aside from the fact that this statement flies in the face of Greenberg's April, 1986 warning about not following the team approach, I have dealt with the issue of Carlen's medical supervision previously and I again reject his claim here.

As early as 1986, two years prior to the filing of the Charges, Carlen was warned about his inability or unwillingness to cooperate with other physicians in the care of inmates. (County Exhibits # 25 & 26) He has shown little or no willingness to work with his colleagues and medical supervisors in the treatment of inmates and, through his action (or inaction), may have put those patients at risk.

I find that Carlen is guilty of all five Specifications contained in Charge II.

The credibility issue was vital in my consideration of the eight specifications contained In Charge III. Here, Carlen is accused of deviating "...from accepted medical practice..." The testimony here was necessarily medical in nature. Not having a medical background, I must rely on credible witnesses for my information. Based on the criteria previously listed I repeat that, in the face of contradictory medical testimony, the County's witnesses must be considered more credible than the Respondent's witnesses.

I find Carlen guilty of all eight Specifications contained In Charge III.

Charge IV accuses Carlen of insubordination and/or incompetence by "refusing to accept medical supervision from the medical director..." As I have stated previously there is no issue as to whether the medical director has the authority to medically supervise Carlen. The only issue is whether or not orders were issued and whether or not Carlen complied with them.

Three of the four Specifications here deal with diets for inmates. On July 21, 1986, Dr. Greenberg issued guidelines for special diets for medical reasons. (County Exhibit #29) On that same date he wrote to Carlen, telling him that several of the special diets he ordered were not appropriate. (County Exhibit #30) The clear message in this memorandum is that such orders should not be repeated.

The County had the right to issue medical directives to Carlen and the record shows that he felt no compulsion to obey them and, in fact, did not obey them.

I find Carlen guilty of all four Specifications contained In Charge IV.

Charge V alleges that Carlen refused to provide medical care to patients. Again, as I stated in my discussion of Charge III, in the face of conflicting medical testimony I find the County's witnesses most credible.

I find Carlen guilty of all five Specifications contained in Charge V.

To summarize, I find Dr. Robert Carlen guilty of all Charges and Specification levied against him.

RECOMMENDATION

After reviewing and considering all testimony, evidence and both post-hearing briefs, and after finding the Respondent guilty of all Charges and Specifications, it is my recommendation that Dr . Robert Carlen be immediately terminated from employment with Suffolk County.

Respectfully Submitted,
/s/ Daniel A. Bahr
Daniel A. Bahr
Hearing Officer
January 23, 1990

[Appendices omitted.]

APPENDIX K

STATE OF NEW YORK
DEPARTMENT OF HEALTH

Corning Tower
The Governor Nelson A. Rockefeller Empire State Plaza
Albany, New York 12237

David Axelrod, M.D.
Commissioner

OFFICE OF PUBLIC HEALTH
Linda A. Randolph, M.D., M.P.H.
Director
William F. Leavy
Executive Deputy Director

February 27, 1989

PERSONAL AND CONFIDENTIAL

Robert Carlen, M.D.
17 Main Street
Sayville, New York 11782

RE: DS-87-11-772

Dear Dr. Carlen:

The Office of Professional Medical Conduct is responsible for investigating reports of alleged professional misconduct.

As you are aware, you were the subject of an investigation initiated by allegations of misconduct received by this Office. Information, such as medical records, was obtained and carefully examined with particular reference to the allegations.

The information was then reviewed by a physician consultant of this Office. Based on the physician consultant's recommendation and a review of the information by this Office, it has been determined that there is no evidence of professional

misconduct and the investigation has been closed.

A medical conduct investigation is not a disciplinary proceeding. Investigations conducted by this Office are maintained as confidential. Information about this investigation, including the source of the report, cannot be made available to you, your representative or the general public.

Sincerely,
Leeanne Raga
Health Program Administrator
Office of Professional Medical Conduct

LR/mtm

No. 96-1243

Supreme Court, U.S.
FILED
JUN 10 1997

In The

Supreme Court of the United States

October Term, 1996

ROBERT CARLEN, M.D.,

Petitioner,

vs.

DEPARTMENT OF HEALTH SERVICES, DAVID HARRIS, M.D., Individually and as former Commissioner of the Suffolk County Department of Health Services;

SUFFOLK COUNTY,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Has the Petitioner established that "compelling reasons" exist for this Court to grant the writ where he has failed to cite or discuss any of the considerations governing review on certiorari (Rule 10) in his petition and where all that he is seeking is yet another review of his termination from employment?

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STATEMENT OF THE CASE

The petitioner, Robert Carlen, M.D., is a former part-time civil service employee of the Suffolk County Department of Health Services. He worked as a physician at the Suffolk County Correctional Facility (JA30).[1]

On or about December 4, 1986, the petitioner commenced a proceeding pursuant to Article 78 of the New York Civil Practice Law and Rules (McKinney 1994) against his supervisors, David Harris, M.D., William Steibel, M.D. and Maury Greenberg, M.D., to obtain a judgment to enjoin his supervisors from interfering with his professional judgment and his professional duties in the treatment of his inmate patients. A Justice of the Supreme Court, State of New York, granted the supervisors' motion to dismiss that proceeding by order dated May 1, 1987 (A36-39).[2] Petitioner appealed and the Appellate Division of the Supreme Court of the State of New York, Second Department, affirmed the lower court's decision finding that the petitioner failed to exhaust his administrative remedies and that the petition failed to state a cause of action. *Carlen v. Harris*, 140 A.D. 2d 288, 527 N.Y.S. 2d 538 (2d Dept. 1988), *lv. to appeal denied*, 73 N.Y. 2d 709, 540 N.Y.S. 2d 1004, 538 N.E. 2d 356 (1989) (A30-35).

Specifically, the Appellate Division stated:

Over and above this flaw in the proceeding,

---

1. References preceded by "JA" are to pages in the Joint Appendix in the Court of Appeals for the Second Circuit.

2. References preceded by "A" are to pages in the Appendix before this Court.

> we are of the view that the petition fails to state a cause of action. The respondents clearly had the authority to direct the manner in which the petitioner performed his duties. The petition and the papers submitted by the petitioner in response to the respondents' motion to dismiss fail to demonstrate that the respondents exceeded their authority in any way and is therefore insufficient as a matter of law (*see McGraw v. Shapiro*, 56 A.D. 2d 624, 391 N.Y.S. 2d 681).

140 A.D. 2d at 290, 527 N.Y.S. 2d at 539 (A35).

Petitioner was terminated from employment on or about February 13, 1990, following an administrative hearing held pursuant to Section 75 of the New York Civil Service Law (McKinney 1983) (A40-41). The basis for the termination was a finding that petitioner was guilty of 46 disciplinary charges that were the subject of the administrative hearing (A42-53).

The hearing officer determined, in sum, that Petitioner deviated from accepted medical practice on eight occasions (A52), refused to provide medical care to patients on five occasions (A52) and failed to follow procedural and substantive medical orders from supervisors in twenty-eight instances (A50; A52). Most notably, with respect to five of the charges, the hearing officer noted that Petitioner's action (or inaction) may have put patients at risk (A51).

On June 4, 1990, Petitioner commenced another C.P.L.R. Article 78 proceeding in New York State Supreme Court, this time to overturn his termination. That proceeding was transferred to and heard by the Appellate Division of the Supreme Court of the State of New York, Second Department.

The Appellate Division found that there was substantial evidence to support the findings of guilt and the termination of the petitioner and that there was no support for his retaliation claim (A27-29). The court stated:

> [W]e note that we previously determined, as a matter of law, that the respondent had the authority to direct the manner in which the petitioner performed his duties, and that the petitioner's arguments set forth in the instant proceeding virtually mirror those propounded and rejected earlier (*see Carlen v. Harris,* 140 A.D. 2d 288).

Carlen v. Harris, 200 A.D. 2d 619, 620, 608 N.Y.S. 2d 851 (2d Dept. 1994), *lv. to appeal denied,* 83 N.Y. 2d 757, 615 N.Y.S. 2d 874, 639 N.E. 2d 415 (1994) (A28-29).

Petitioner commenced the instant civil rights action against the Suffolk County Department of Health Services and David Harris (hereinafter the "respondents") on January 15, 1993 (JA27). An amended complaint was served on January 19, 1993 (JA28-53). Petitioner alleged that the respondents violated the jail inmates' Eighth Amendment rights to adequate medical care and accurate medical records, and Petitioner's First Amendment right of free speech (JA31-37). Further, Petitioner claimed that the Civil Service Law § 75 disciplinary proceeding which was affirmed by the Appellate Division was a hoax which deprived him of his Fifth and Fourteenth Amendment due process rights (JA32). Petitioner sought annulment of his termination, reinstatement to his employment, compensatory and exemplary damages and an order prohibiting the respondents from continuing to deprive him and Suffolk County prisoners of their constitutional rights.

The Respondents moved to dismiss the complaint on the grounds that the Petitioner had no standing to assert the Eighth Amendment rights of inmates, that the complaint failed to state a claim under the First, Fifth and Fourteenth Amendments, and that the full faith and credit clause precluded relitigation of issues finally determined by the New York State courts. The Honorable Leonard D. Wexler, United States District Court Judge, granted the Respondents' motion. The District Court found that petitioner's due process, equal protection and First Amendment claims were barred under the doctrine of issue preclusion. The District Court further found that the Petitioner failed to state an equal protection cause of action and that he lacked standing to assert a violation of the inmates' rights to adequate medical care. While the District Court did not specifically recognize petitioner's indirect Eighth Amendment claim ("constitutional right to refuse to violate the inmates' constitutional right"), it found that the state court's finding of no retaliation precluded a finding in his favor.

The Court of Appeals for the Second Circuit affirmed the District Court in a summary order for substantially the reasons stated by the District Court (A1-A4). The Court of Appeals also denied the petition for a rehearing en banc (A5). This Petition for a Writ of Certiorari ensued.

SUMMARY OF THE ARGUMENT

There are no compelling reasons for this Court to grant further judicial review of Petitioner's disciplinary proceeding.

REASONS FOR DENYING THE WRIT

PETITIONER HAS FAILED TO ESTABLISH JURISDICTION FOR REVIEW OF THE ORDERS APPEALED FROM, AS REQUIRED BY RULE 10 OF THIS COURT.

In *Braxton v. United States*, 500 U.S. 344, 347, 111 S. Ct. 1854, 1857, 114 L. Ed. 2d 385 (1991), this Court stated that "[a] principal purpose for which we use our certiorari jurisdiction . . . is to resolve conflicts among the United States Courts of Appeals and state courts concerning the meaning of provisions of federal law". In *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 74, 75 S. Ct. 614, 616, 99 L. Ed. 897 (1955), this Court, in considering the meaning of the phrase "special and important reasons" within the context of the former version of Rule 10 of the Supreme Court Rules, noted that it does not sit for the "benefit of the particular litigants", and declared that the issue presented must involve a "a problem beyond the academic or the episodic." The Court stressed that "it is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeals." *Id.* at 79, 75 S. Ct. at 620, 99 L. Ed. at __, *quoting Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393, 43 S. Ct. 422, 423, 67 L. Ed. 712 (1923).

None of the considerations specified in Rule 10 are in any way implicated by the issues presented by this Petition. Indeed, the Petition does not even address and brief any of the considerations under Rule 10. The order appealed from does not involve a decision of a United States Court of Appeals which is "in conflict with a decision of another United States Court of

Appeals on the same important matter," nor does it involve resolution of a federal question "in a way that conflicts with a decision by a state court of last resort," nor has it "so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power." Rule 10(a), Rules of the Supreme Court. This Court has settled the law pertaining to the preclusive effect of a state court judgment, and that law was correctly applied by the courts below. *See Migra v. Warren City School District Board of Education*, 465 U.S. 75, 84-85, 104 S. Ct. 892, 79 L. Ed. 2d 56 (1984); *Kremer v. Chemical Construction Corp.*, 456 U.S. 461, 466, 102 S. Ct. 1883, 72 L. Ed. 2d 262 (1982); *Allen v. McCurry*, 449 U.S. 90, 103-104, 101 S. Ct. 411, 66 L. Ed. 2d 308 (1980).

CONCLUSION

For all the reasons set forth above, it is respectfully requested that the Petition for a Writ of Certiorari from Orders of the United States Court of Appeals for the Second Circuit, dated September 26, 1996 and November 8, 1996, be denied in all respects.

Respectfully submitted,

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(3)

FILED

MAR 17 1997

CLERK

No. 96 - 1243

In The

Supreme Court of the United States

OCTOBER TERM 1996

ROBERT CARLEN, M.D.

Petitioner,

- v -

DEPARTMENT OF HEALTH SERVICES;
DAVID HARRIS, M.D., Individually and as former Commissioner of the Suffolk County Department of Health Services;
SUFFOLK COUNTY,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF

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EDITOR'S NOTE

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ARGUMENT

POINT I

THIS CASE PRESENTS A NOVEL QUESTION OF FEDERAL LAW, THE SUBSTANCE OF WHICH, THE TRUSTWORTHINESS OF EMPLOYED PHYSICIANS, IS CAUSING MILLIONS OF AMERICANS GREAT ANXIETY. THE SUPREME COURT HAS JURISDICTION UNDER RULE 10(C).

The respondents have consistently tried to trivialize this controversy, characterizing it as a local affair in which "all [Dr. Carlen] is seeking is yet another review of his termination from employment" (brief in opposition, *i*). They argue that Dr. Carlen has failed to offer any "compelling reasons" in compliance with Rule 10, for the Supreme Court to review this case.

The U.S. Court of Appeals for the Second Circuit has decided an important question of federal law that has not been, but should be, settled by this Court (Rule 10(c)). Dr. Carlen has alleged violation of fundamental constitutional rights, which District Court should adjudicate *de novo* instead of favoring one state law determination (the county's and the state court's) over the other (the state health department's).

In this case, the first of its kind in the United States, Dr. Carlen asks this court to decide whether a licensed physician can be fired from a job he was otherwise entitled to keep, for refu..ig to compromise his best professional judgment and for maintaining his fiduciary relationship to his patients, or whether, to continue to earn his living, he had to deceive his patients and give them treatment he didn't approve of, while saying nothing of his true opinion on their official medical record.

In short, this is a case about the trustworthiness that's at

the very heart of medical practice. We scarcely exaggerate when we say that the issue presented, with its ramifications, is whether there will continue to be a medical profession in America.

The Supreme Court should grant certiorari because of the enormous public concern that employed physicians, who now constitute about half the practicing doctors in the United States, have been forced to abandon the professional obligations that Dr. Carlen refused to, and are now simply tools, creatures and mouthpieces of their employers.

State legislatures and executive departments, the federal executive, and soon, perhaps, the Congress (Pear, R. "Congress Weighs More Regulation on Managed Care," *New York Times*, March 10, 1997, p. A1, col. 8), have enacted laws and regulations prohibiting some of the gagging of physicians, prohibiting "drive-through" childbirth, requiring inpatient stays for mastectomies, etc. But these piecemeal efforts cannot possibly address every clinical situation, every organ system, every surgical procedure, and, for this reason, are doomed to failure as a comprehensive or global solution to today's widespread concerns.

There is, however, a class of people who have dealt and can continue to deal with every problem that any patient might present, namely, the members of the medical profession, who can and will exercise their professional judgment, but not if doing so costs them their livelihood.

We add that although governmental health employers are free of the taint of lucre that attaches to health maintenance organizations and other profit making enterprises, from the point of view of a physician-employee who receives professional orders he disagrees with, all employers are the same. Their motive is irrelevant.

POINT II

UNDER STATE LAW, TWO WHOLLY OPPOSED DETERMINATIONS OF ALL THE FACTUAL AND LEGAL ISSUES, WITH NO MEANS OR MECHANISM TO RECONCILE THEM, LEAVE THE ENTIRE CONTROVERSY UNRESOLVED. THE OPPOSED OUTCOMES OFFER NO GUIDANCE TO THE MANY SIMILARLY-SITUATED DOCTORS WHO MUST PROVIDE MEDICAL CARE AND TO THEIR PATIENTS WHO MUST RECEIVE IT, BUT WHO DO NOT KNOW WHAT THEY HAVE A RIGHT TO EXPECT.

This litigation is in its eleventh year, but no issue of fact or law has ever been resolved.

Dr. Carlen must maintain his medical license to continue practicing in New York State, including practicing in the employ of the respondents, who know that their own employee, Dr. Greenberg, initiated the state's investigation of Dr. Carlen. The respondents also know, directly, that the New York State Department of Health supoened from them all their charges against Dr. Carlen and the medical records upon which they were based.

The respondents deal with the state's wholly opposed conclusion ("no evidence of misconduct") by completely ignoring it, but others, including Dr. Carlen, do not have this luxury. The national uproar we discussed above shows that other physicians are getting squeezed between their employers' demands and the requirements of the state licensing and disciplinary agencies.

Both the Appellate Division of the New York Supreme Court, and New York State through its education (Commissioner Ambach) and health departments, have issued final, unappealable, and completely contradictory determinations. So which one are doctors to obey? Should they put their employer ahead of their

patients (the respondents' and the appellate court's view), or their patients ahead of their employer (the plaintiff's and the state's view)?

Perhaps the Appellate Division really meant, although it certainly didn't say, that Dr. Carlen did not have civil service protection, that if he disagreed with the professional orders he was given he should simply have quit. (The alternative would require the court to accept the Nuremberg defense.) But where could Dr. Carlen have gone?

Because of the massive transformation of practice arrangements since this litigation began (which Dr. Carlen correctly foresaw), and because, sooner or later, professional disagreements must occur, his getting a different job would just transfer the controversy to a different venue. And so eventually, every physician must buckle while hoping the licensing authorities don't catch him, because none can tolerate the economic and psychological stresses of repeated firings.

CONCLUSION

Because of the novelty and public importance of the issues presented, and because of their total absence of resolution and of guidance to others after ten years of litigation, the U.S. Supreme Court should grant Dr. Carlen's petition for a writ of certiorari.